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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74 - 5566

PEARL BARRETT,

Petitioner

-vs-

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

PROCEEDING IN FORMA PAUPERIS

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TABLE OF CONTENTS

	Page
Opinion Below.	1
Jurisdiction	2
Questions Presented.	2
Constitutional and Statutory Provisions Involved.	3
Statement of the Case.	4
Reasons For Granting The Writ	
I. Whether Title 18 U.S.C. Section 922(h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm	6
II. Whether Title 18 U.S.C. Section 922(h) violates the Due Process Clause of the United States Constitution in that it did not require a showing of notice o knowledge on the part of the petitioner of his statutory restriction against or purchasing any firearm transported in interstate commerce	9
Conclusion	14
Appendix	15
Opinion of the Sixth Circuit Court of Appeals.	16-27
Verdict of the Jury	28-29
Document from Governor or Kentucky Restoring Petitioner's Civil Rights Subsequent to Felony Conviction	30

TABLE OF AUTHORITIES

Cases	Page
Lambert v. California, 355 U.S. 225 (1957).	10
People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1956).	13
Tot v. United States, 319 U.S. 463 (1943)	8
United States v. Bass, 404 U.S. 336 (1971).	5, 9
United States v. Craven, 478 F.2d 1328 (6th Cir., 1973).	5, 8
United States v. Crimmins, 123 F.2d 271 (2nd Cir., 1941).	12
United States v. Day, 476 F.2d 562 (6th Cir., 1973).	9
United States v. Freed, 401 U.S. 601 (1970)	13
United States v. Jones, 481 F.2d 653 (2nd Cir., 1973	9
United States v. Renner, 496 F.2d 922 (6th Cir., 1974).	11
United States v. Ruffin, 490 F.2d 557 (8th Cir., 1974).	8

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on October 18, 1974, which affirmed the criminal conviction of petitioner by the United States District Court, Eastern District of Kentucky, Jackson Division, whereby petitioner was found to have violated Title 18 U.S.C. Section 922(h) for having in his possession a firearm transported in interstate commerce subsequent to his previous felony conviction for housebreaking.

Opinion Below

The opinion of the United States Court of Appeals for the Sixth Circuit is printed herein as Appendix A. The order of the District Court judge for the Eastern Division of Kentucky, Jackson Division, and the verdict of guilty by the jury is reproduced herein as Appendix B.

JURISDICTION

The judgment of the United States District Court for the Eastern District of Kentucky, Jackson Division, was entered against petitioner on May 24, 1973 convicting him of receiving and possessing a firearm transported in interstate commerce, having been convicted of a felony, in violation of Title 18, Section 922(h), United States Code. The United States Court of Appeals for the Sixth Circuit affirmed the conviction on October 18, 1974, stating that there was no ambiquity in Section 922(h), and that the United States did not have to prove that petitioner himself was directly involved in the interstate transportation of the firearm. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Part V of the Rules of this Court; and more specifically because the Court of Appeals has rendered a decision which is in conflict with other Courts of Appeals on the same matter, namely the Eighth Circuit Court of Appeals' decision in United States v. Ruffin, 490 F.2d 557 (8th Cir., 1974); and in addition, the decision in this matter is in conflict with the Supreme Court's finding in United States v. Bass, 404 U.S. 336 (1971).

QUESTIONS PRESENTED

1. Whether Title 18 U.S.C. Section 922(h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm.

2. Whether Title 18 U.S.C. Section 922(h) violates the Due Process Clause of the United States Constitution in that it did not require a showing of notice or knowledge on the part of the

petitioner of his statutory restriction against purchasing any firearm transported in interstate commerce.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment XIV Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES INVOLVED

Title 18 U.S.C. Section 922(h)

It shall be unlawful for any person----

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On or about the first day of April, 1972, petitioner Pearl Barrett bought a Smith and Wesson .38 caliber pistol from Larry D. Bates, the owner and operator of the Western Auto Store in Bonneville, Kentucky. Some time after that purchase, Barrett was stopped by the Owsley County, Kentucky Sheriff's Department for driving while under the influence of an alcholic beverage, and the firearm was discovered on the floor of his car and confiscated.

Subsequent to the arrest for drunk driving, a warrant was issued for petitioner's arrest for a violation of the Gun Control Act, and more specifically, Title 18 U.S.C. Section 922(h). Petitioner had been previously convicted of a felony in January, 1967, and Section 922(h) prohibits a convicted felon from possessing a firearm. Petitioner was then tried and convicted of this offense in the United States District Court for the Eastern District of Kentucky at Jackson on May 24, 1973. Prior to and during the trial, defense counsel moved to quash the indictment on the basis that petitioner had received, on June 20, 1969, by virtue of executive order of the Governor of Kentucky, a Restoration of All Civil Rights lost due to his felony conviction of January, 1967, but the trial court denied these motions.

This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit, after oral argument, on October 18, 1974.

REASONS FOR GRANTING THE WRIT

Title 18 U.S.C. Section 922(h), the statute under which petitioner was charged and convicted prohibits one who has been convicted of a felony from possessing a firearm which has been shipped or transported in interstate commerce. The primary point of controversy in this case evolves about the interpretation of the statute with respect to the interstate commerce nexus which is an essential element of the crime. The Eighth Circuit Court of Appeals has held that the statute only speaks to those persons directly involved in the actual interstate transportation of the weapon, and does not reach those persons who ultimately come into possession of a weapon which had been previously transported in a transaction to which they were not a part. The Sixth Circuit Court of Appeals has stated essentially the same opinion in U.S. v. Craven, 478 F.2d 1329 (1973), but in the case now before the Court, the Sixth Circuit did not follow its earlier reasoning. This being the case, there now exists a conflict of opinions among the circuits, and though the Supreme Court has approached the problem in U.S. v. Bass, 404 U.S. 336 (1971), it has not yet spoken definitely regarding the reach of 922(h).

In addition, there exists a due process question of notice to those persons affected by the statute. No element of mens rea or scienter was required to be proven by the government at the trial, even in the face of testimony by the petitioner that he was not aware of the statute's prohibition. Petitioner's position was even stronger due to the fact that he had received what he believed to be a pardon from the Governor of Kentucky, which he felt had lifted the disabilities of his prior felony conviction, and thus in his own mind established the belief that he did not fall within a class of

persons designated as previously convicted felons. This set of circumstances raises a question as to whether the necessary criminal intent was present at the time the crime was allegedly committed.

Petitioner contends that the statute under which he was charged does not apply to him, and even assuming arguendo that it did, he had no notice of it nor did he possess the essential criminal intent to violate said statute.

With regard to all issues raised, the ruling below is in conflict with the applicable decisions of this Court concerning each issue raised.

I. WHETHER TITLE 18 U.S.C. SECTION 922(h) APPLIES TO PETITIONER WHO PURCHASED A FIREARM IN AN INTRASTATE TRANSACTION, AND WAS NOT INVOLVED IN ANY MANNER WITH THE INTERSTATE TRANSPORTATION OF SAID FIREARM.

Petitioner purchased the weapon in question in his home town of Booneville, Kentucky, from one Larry D. Bates, the owner and operator of the Western Auto Store from which the gun was bought. Mr. Bates was himself a resident of Booneville. The facts, at this point are clear: no element of interstate commerce has entered the transaction. It is only when the origin of the weapon is disclosed that interstate commerce becomes involved. At trial, the testimony indicated that Mr. Bates (our emphasis) had purchased the gun from the Western Auto Distributing House in Gastonia, North Carolina, (R. 40), and that the gun had been manufactured in Springfield, Massachusetts, (R. 52). At no time was any evidence introduced which implicated the petitioner in any direct interstate transaction. His purchase was a pure intrastate transaction, and as such, did not come within the purview of Title 18 U.S.C. Section 922(h), the statute under which he was charged.

This contention is directly supported by United States v. Bass, 404 U.S. 336 (1971). The defendant, Bass, was convicted of possessing firearms in violation of Section 1202(a)(1) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, a statute quite similar to 922(h), under which petitioner Barrett was convicted. The Court, in explaining the consistencies between Title VII and Title IV, of which Section 922(h) is a part, stated:

> " . . . however, Title IV apparently does not reach possessions or intrastate (our emphasis) transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation."
>
> Id., at 342.

A title VII offense is made out if the firearm was pssessed or received "in commerce or affecting commerce," but this is not the case for a Title IV offense, as the Court so found. The Court based this opinion on the fact that Section 922(h) was a modified version of 15 U.S.C. Section 902(e) and (f), which in turn amended the first such statute, 52 Stat. 1250, 1251 (1938). The original statute contained a presumption that mere possession of a firearm was transported in interstate commerce. That presumption was struck down in Tot v. United States, 319 U.S. 463, 466 (1943), which was relied upon by the Court in Bass as the proper interpretation:

> "The Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate."

The Eighth Circuit Court of Appeals has ruled on this same issue in the case of United States v. Ruffin, 490 F.2d 557 (1974). In Ruffin, the defendants were charged, as was petitioner, under Section 922(h). The firearms involved had been shipped from Connecticut to Texas and were then stolen in Illinois some seven

months prior to the time they were found in defendants' possession. The Court concluded that:

> " . . . it is not sufficient under 922(h) for the government to prove that the firearm had at some remote time previously traveled in interstate commerce. As pointed out in Bass, Title IV is primarily concerned with the transportation, of firearms. Accordingly, for a receipt to be cognizable under 922(h), the government must show that at the time the gun was received it was part of an interstate transportation." Id. at 560.

This ruling is entirely consistent with what the Sixth Circuit labeled "dictum" in Bass. And the Sixth Circuit in an earlier decision held that:

> " . . . 18 U.S.C. Section 922(h) speaks only of receipt of firearms or ammunition in interstate transportations and does not concern possessions at all." United States v. Craven, 478 F.2d 1329, 1336 (6th Cir., 1973)

Both the holding in Ruffin and the holding in Craven supported petitioner's contention that he was not in violation of 922(h). No showing was made that petitioner was directly involved in the original transaction which brought the firearm into Kentucky. It was conceded that he was in possession of the weapon, but Bass, Ruffin and Craven have all held that this showing of possession only is not sufficient to justify a conviction.

But the Sixth Circuit's decision below which affirmed petitioner's conviction is in direct conflict, not only with Bass, and Ruffin, but with its own decision in Craven. No explanation is given for this inconsistency other than the Court's statement in its opinion that the language in Bass regarding Section 922(h) was "dictum." As to Craven the Court found that a second and more recent transportation of the firearm in interstate commerce was sufficient to support a conviction, but no such second transportation was evidenced in petitioner's case, and Craven should not have been distinguished away.

There thus appears to be not only a conflict among the Circuits as to the application of 922(h), but also an apparent inconsistency in the Sixth Circuits own rulings. At no time prior to petitioner's case had the mere possessor of a firearm, with no connection to the interstate transportation of said weapon, been held accountable under Section 922(h). Gun dealers were convicted under this section, United v. Day, 476 F.2d 562 (6th Cir., 1973), and those persons charged under Title 18 Section 1202(a), United States v. Bass, 404 U.S. 336 (1971), were also convicted but mere possession such as that of petitioner was generally accepted to be outside the scope of 922(h).

It is therefore submitted that the conviction by the trial court and the subsequent affirmation by the appellate court are in conflict with recent decisions, both of this Court and other appellate courts, and as such petitioner's conviction should be overturned.

II. WHETHER TITLE 18 U.S.C. SECTION 922(h) VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION IN THAT IT DID NOT REQUIRE A SHOWING OF NOTICE OR KNOWLEDGE ON THE PART OF THE PETITIONER OF HIS STATUTORY RESTRICTION AGAINST PURCHASING ANY FIREARM TRANSPORTED IN INTERSTATE COMMERCE.

Petitioner, by his own testimony at the trial, stated that he had no knowledge of the statutory restriction placed upon him by Title 18 U.S.C. 922(h) regarding the purchase of firearms. At the time of purchase he was not asked to sign the registration form #4473 required by the Government from anyone who purchases a gun. Had the seller presented him with this form, and had the petitioner signed it and thus lied about his prior conviction, the situation would be quite different.

Scienter has been determined not to be an element of this offense, U.S. v. Jones, 481 F.2d 653, (2nd Cir., 1973), but it

must be presumed that in each case the purchaser is given an opportunity to read the registration form and become aware of the various restrictions. If, given that opportunity, he claims not to have read or understood the form, he would not have an adequate defense. But surely, if one is not made aware of his legal incapacity, and no attempt at all is made to have him read and sign the registration form which applies, he cannot then be held liable for his ignorance. "The rule that 'ignorance of the law will not excuse' is deep in our law . . . On the other hand, due process places some limits on its existence. Engrained in our concept of due process is the requirement of notice." Lambert v. California, 355 U.S. 225, 228 (1957).

The Lambert case cited above is directly on point with the case at hand. In Lambert, the City of Los Angeles Municipal Code, Section 52.39 made it unlawful for any convicted felon to remain in Los Angeles for more than five days without registering. "No element of willfullness is by terms included in the ordinance nor read into it by the California court as a condition necessary for a conviction." Id. at 227. The facts, then, are almost identical to petitioner's situation. Defendant Lambert had no knowledge of the ordinance, yet was convicted under it. The Supreme Court stated the issue as such:

> "The question is whether a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." Id., at 227

The Court stated that the conduct involved was "wholly passive," and the same can be said of petitioner Barrett's act----purchasing a firearm is, of itself, a passive act. It is only made offensive by statute; common sense would not determine this to be a criminal

act. The Lambert Court held that a conviction under these circumstances was completely invalid:

> "We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinanace can stand. As Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear' . . . Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. "Id, at 229.

A few months prior to the decision in petitioner's case, the Sixth Circuit decided the case of United States v. Renner, 496 F.2d 922 (6th Cir., 1974). The facts in Renner concerned an individual who was charged with making false statements to the effect that he was not under indictment at the time he purchased a firearm. Renner himself believed the indictment had been dismissed, when in fact it had only been set aside with leave to reinstate. The appeal was based on the trial court's error in instructing the jury that lack of knowledge of the indictment at the time of receipt of the firearms was not a defense to a 922(h) violation.

Renner is similar to Lambert in that "except for the claim that Renner was under indictment at the time, his purchases of the handguns were entirely lawful." Id. at 924. Thus, the issue became whether scienter was an element of the offense stated in 922 (h). Id. at 924. Similarly, scienter becomes a primary issue in petitioner's case.

On June 20, 1969, Louis B. Nunn, then Governor of Kentucky, presented petitioner with an impressive-looking document which stated that he was restored to all civil rights lost as a consequence of his prior felony conviction. Petitioner felt that all

disabilities arising from his conviction had been expunged by virtue of this document. When he purchased the Smith and Wesson .38 caliber which is the basis for his conviction, in his own mind he did not believe himself to be a felon, as defined by 922(h). Assuming arguendo that he was aware of Section 922(h), he still was not aware that he, personally, was affected by that statute. On direct examination petitioner was asked (at page 66 of the trial record):

> Q. "Did you read that part, Mr. Barrett which states that, 'Whereas, it is represented to me that the conduct of Pearl Barrett has been of an exemplory nature and merits the restoration of all civil rights lost by reason of a felony.' Did you read that part?"
>
> A. "Yes, I did."
>
> Q. "What did you understand that to mean, Mr. Barrett?"
>
> A. "Well, I understood that all of my rights had been restored and I would be allowed anything that any other citizen would be allowed to have."
>
> Q. "Did you at the time that you made the purchase have any misgivings or any doubts about your right to own or possess a weapon?"
>
> A. "No, sir, I did not."

Petitioner clearly was under the impression that he was not a convicted felon in the eyes of the law by virtue of his document from the Governor of Kentucky. He stated under oath that he felt he had been restored to the status of an ordinary citizen. He was doing nothing which would be illegal for the ordinary citizen. His offense was not of the common law variety; rather, it was criminal only because made so by statute. No criminal intent existed. The petitioner was doing nothing which he could have reasoned to be wrong. He lacked the essential element of mens rea. As stated by Hon. Learned Hand in United States v. Crimmins, 123 F.2d 271, 272 (2nd Cir., 1941):

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all that is meant by the mens rea, the 'criminal intent', necessary to guilt . . . "

Without question, defendant Barrett was clearly not aware of the facts which made his conduct criminal. He interpreted his pardon for what it was----a restoration of all rights lost by virtue of his conviction. He read that document by the words on its face, and had no supposition that it would be interpreted in any other manner.

The Supreme Court of California, in the case of People v. Vogel, 46 Cal.2d 798, 299 F.2d 850, 855 (1956) spoke to this issue of criminal intent, and the effect of statutory law upon it:

> "At common law an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication."

Scienter and notice thus become intertwined. Petitioner first of all had no knowledge of the existence of the restriction in 922(h), and even had he known of it, he still lacked the necessary criminal intent to violate it. The Sixth Circuit, in deciding Renner, held:

> "In our opinion, in order to convict a person of an offense where being under an indictment is an element, it must be shown that the accused had knowledge of the indictment; without such a showing a serious question of due process would be involved." United States v. Renner, 496 F.2d 922, 926 (1974)

As to mens rea, Justice Brennan in the concurring opinion in United States v. Freed, 401 U.S. 601, 613 (1970), summed up what must be described as a basic premise of the criminal justice system:

> " . . . I think we must recognize, first, that the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."

Petitioner's case varies from Lambert only in so far as the gun is concerned; notice is still a basic requisite to the offense Renner is different only to the extent that Renner was unaware of his legal condition subsequent to his "pardon"; but both of these instances involve a question of status as seen by the person committing the alleged illegal act. We strongly contend that Lambert and Renner directly apply, and that petitioner's right of due process was violated by his arrest and conviction, both of which were upheld by the Sixth Circuit Court of Appeals.

CONCLUSION

For the reason stated above, namely that Title 18 U.S.C. Section 922(h) does not apply to petitioner who had never been involved in the interstate transportation of the firearm in question, and that he had neither notice of the restriction imposed by said statute, nor the necessary criminal intent to violate it, certiorari should be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

PEARL BARRETT,

Petitioner

-vs-

THE UNITED STATES OF AMERICA,

Respondent

APPENDIX

APPENDIX A

No. 73-1872

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PEARL BARRETT, *Defendant-Appellant.*	APPEAL from United States District Court for the Eastern District of Kentucky.

Decided and Filed October 18, 1974.

Before WEICK, EDWARDS and MCCREE, Circuit Judges.

WEICK, J. delivered the opinion of the Court, in which EDWARDS, J., joined. MCCREE, J. (pp. 9-12) filed a dissenting opinion.

WEICK, Circuit Judge. The indictment charged that appellant Barrett, having been convicted in the state court of a felony, housebreaking, knowingly received and had in his possession a firearm, towit, a .32 caliber Smith and Wesson revolver, which had been transported in interstate commerce, 18 U.S.C. § 922(h). He was tried and convicted by a jury and was sentenced to three years' imprisonment.

Barrett had purchased the revolver on April 1, 1972, in a Western Auto Store in Booneville, Kentucky. Western Auto Store had received the gun on March 5, 1972 from Gastonia, North Carolina.

About one-half hour after Barrett had purchased the revolver he was observed by two deputy sheriffs driving his automobile south of Booneville. After the officers chased his

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car a short distance he stopped, and they arrested him for driving while intoxicated. One of the deputies then noticed the firearm on the floor board on the driver's side of Barrett's car; it was loaded.

Barrett had been convicted previously on January 17, 1967, of the housebreaking charge, and was sentenced to two years' imprisonment. On June 20, 1969, after Barrett served his sentence, the Governor of Kentucky signed a partial pardon restoring Barrett only to his civil rights.

Barrett contended in the District Court and here that his purchase of the firearm from the dealer was an intrastate transaction, not within the scope of Section 922(h), and that, in any event the document which he received from the Governor of Kentucky constituted a full pardon and therefore his previous conviction had been wiped out.

I

THE STATUTE

Section 922(h) provides in relevant part:

> (h) It shall be unlawful for any person —
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This section is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.

It would appear to us that under the Government's proof this statute has been literally complied with. The firearm indeed had been transported in interstate commerce, from North Carolina to Kentucky, less than one month before Barrett received it.

Barrett relies on dictum contained in the majority opinion in *United States* v. *Bass*, 404 U.S. 336 at 342-343 (1971). *Bass* involved a prosecution under Title VII of the Omnibus Crime Control and Safe Streets Act, while the prosecution in the present case was under Title IV of the Act. The dictum is as follows:

> . . . [H]owever, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation.[10]

Footnote 10 reads as follows:

> Title IV, 18 U. S. C. §§ 922(g) and (h), is a modified and recodified version of 15 U. S. C. §§ 902(e) and (f) (1964 ed.), 75 Stat. 757, which in turn amended the original statute passed in 1938, 52 Stat. 1250, 1251. Each amendment enlarged the group of people coming within the Act's substantive prohibitions against transportation or receipt of firearms in interstate commerce. The wording of the substantive offense has remained identical, although the original Act had a provision that possession of a firearm "shall be presumptive evidence that such firearm or ammunition was shipped or transported or received [in interstate or foreign commerce]." That presumption was struck down in *Tot* v. *United States*, 319 U.S. 463 (1943), and the Court there noted:
>
> "[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate." *Id.*, at 466.
>
> While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that

> the 1968 Act changed the prior approach to the "receipt" offense. See, *e. g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968). (404 U.S. at 343)

By reference to *Tot*, the complete sentence, of which the foregoing quotation is a part, is as follows:

> Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. (319 U.S. at 466).

The Court in *Tot* further said:

> The Government agrees that this construction is correct. (*Id.* at 466).

It therefore appears that the Government conceded that the construction of the statute by the lower courts was correct, and that the Supreme Court accepted the concession without discussion. In *Tot* all that the Court decided was that the presumptive provision in the Act was invalid.

In the present case the Government has made no such concession, and we are required to decide the issue. Footnote 10 in *Bass* recognized that "the reach of Title IV itself is a question to be decided finally some other day . . . ."[1]

It is our opinion that there is no ambiguity in Section 922(h) of the Act. It means exactly what it says.

Barrett did indeed receive a firearm which had been transported in interstate commerce. Such receipt violated the plain

[1] The dictum in *Bass* was discussed in our decision in *United States* v. *Craven*, 478 F.2d 1329, 1336 (6th Cir. 1973), where there had been a second and more recent transportation of the firearm in interstate commerce, which we held was sufficient to support a conviction under Section 922(h).

language of the statute. It was not necessary for the Government to prove that Barrett received the firearm from the common carrier.

II

THE PARDON

It will be noted that Section 922(h) contains no exemption for any one who has been pardoned.

Barrett in the District Court relied on the exemption contained in 18 U.S.C. § 1203 Appendix, which appears in 18 U.S.C. § 3331 to End, page 496, and reads as follows:

> § 1203 Exemptions
>
> This title shall not apply to –
>
> (1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and
>
> (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

Section 1203 is part of Title VII of the Act and would not appear to apply to an indictment under Title IV of the Act. But if the exemption did apply, it would not help Barrett because the alleged pardon did not authorize him to receive the firearm.

The pardon reads as follows:

> To all to Whom These Presents Shall Come, Greeting:
>
> Whereas, It is represented to me that the conduct of PERRY BARRETT has been of an exemplary nature and merits the restoration of all civil rights lost by reason of conviction of a felony.
>
> Now Know Ye, That in consideration of the premises

and by virtue of the power vested in me by the Constitution, I do hereby grant unto the said PEARL BARRETT

ALL THE RIGHTS OF CITIZENSHIP

denied him in consequence of said judgment of conviction. and I direct that all officers of this State respect this restoration.

In Testimony Whereof, I have caused these letters to be made patent and the seal of the Commonwealth to be hereunto affixed. Done at Frankfort, the 20th day of June in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 78th year of the Commonwealth.

[SEAL] /s/ Louie B. Nunn
By the Governor

All that the pardon purported to do was to restore "all civil rights lost by reason of conviction of a felony."

Section 77 of the Kentucky Constitution provides:

> He [the Governor] shall have the power to . . . commute sentences, grant reprieves and pardons, except in case of impeachment.

In *Herndon* v. *Commonwealth*, 105 Ky. 197 at 200 (1899), the Court quoted the following language taken from *Mount* v. Com., 2 Duv., 93, with respect to a Section 77 pardon:

> The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more.

The civil rights to which Barrett was restored by the pardon were the right to suffrage provided for in Section 145 of the Kentucky Constitution, the right to hold public office as provided in Section 150 of the Constitution, and the right to serve on a jury, provided in K.R.S. 29.025. These constitutional and

statutory provisions expressly state that their civil rights are restored by the pardon.

The differences between a pardon merely restoring civil rights and a pardon relieving a convict of the penalty are pointed out in *Arnett* v. *Stumbo*, 287 Ky. 433, 435-436, 153 S.W.2d 889 (1941), where the Court stated:

> It will be perceived that persons losing their right of citizenship whereby they become disqualified to exercise the right of suffrage under the voters section "may be restored to their civil rights by executive pardon"; whilst the disqualification to seek and hold office under the office holding section "may be removed by pardon of the governor." There is no language in either of those sections expressly, inferentially or otherwise touching or dealing with a cancellation by any chief executive of the corporal punishment inflicted upon a convict for violation of any criminal law, the power to grant which is contained in Section 77 of our Constitution. The executive clemency provided for by both of the sections referred to (145 and 150) goes no farther than to permit the chief executive to restore lost rights of citizenship to the one convicted so that he might thereafter possess such rights as though no conviction had ever occurred. The rights so lost pertain exclusively to participation in the selection and the holding of a public office in the Commonwealth each of which is taken away by the sections of the Constitution referred to, but which may be restored by executive clemency as therein provided. Clearly, therefore, such restoration relates solely to the qualifications of voters in this Commonwealth and to the qualifications of those who seek and obtain public office within it.

The Court further said:

> . . . [The Governor] is expressly authorized by the sections referred to [Secs. 145 and 150] to lift the disabilities prescribed in them from the shoulders of the convict and to restore him to full and complete rights of citizenship. Such authority is in addition and supplemen-

> tary to the strict pardoning power provided for by Section 77 of the same instrument. (257 Ky. at 437).

In *Illinois Cent. R.R.* v. *Bosworth*, 133 U.S. 92, 103 (1890), the Supreme Court stated the effect of a full pardon:

> In the opinion of the court in the case of *Ex parte Garland*, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to wit: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . ."

In 67 C.J.S., *Pardons*, § 1(b), at 562-563, the several kinds of pardons are discussed:

> There are several kinds of pardons; thus a pardon may be full or partial, absolute or conditional. A pardon is full when it freely and unconditionally absolves the person from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided; it is partial where it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. (Footnotes omitted).

It is clear to us that the pardon in the present case was not a full pardon, but only a partial pardon. There was no remission of guilt, nor of the penalty. The only thing accomplished by the pardon was a restoration of civil rights under Kentucky law.

The rule of *United States* v. *Renner*, 496 F.2d 922 (6th Cir., 1974), should be confined to the facts of that case. The present case involved a question of Kentucky law relating to pardons, and appellant is bound by Kentucky law.

Affirmed.

McCREE, Circuit Judge (concurring in part and dissenting in part). I concur in that part of the court's opinion holding that appellant cannot avail himself of the exemption contained in 18 U.S.C § 1203 Appendix, but only because that exemption is not available to a defendant tried for violation of 18 U.S.C. § 922(h). That exemption applies only to convicted felons charged with receipt of firearms contrary to 18 U.S.C. § 1202. Appellant was indicted under a similar statute, 18 U.S.C. § 922(h), also for receipt of a firearm. The exemption applicable to this offense, provided for in 18 U.S.C. § 925, requires a convicted felon who desires to acquire a firearm contrary to the provisions of § 922(h) to secure the express permission of the Secretary of the Treasury, not a gubernatorial pardon.

I respectfully dissent from that part of the court's opinion holding that the government established that appellant's purchase of the gun from a local dealer satisfied the interstate commerce requirement of 18 U.S.C. § 922(h). In *Tot* v. *United States*, 319 U.S. 463 (1943), the Supreme Court was presented with two cases that required it to construe and to determine the validity of the predecessor statute to section 922 which provided:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, in violation of this Act. *Id.* at 464, *quoting* C. 850. 52 stat. 1250, 1251; 15 U.S.C. § 902(f).

The Supreme Court observed in its opinion that two federal courts of appeals, including this court, had held that "the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not

extend to the receipt, in an intrastate transaction, of such articles which at some prior time, have been transported interstate." *Id.* at 466. The Court adopted this construction as authoritative in order to determine the validity of the presumption that Congress had created in the second portion of the statute. It invalidated the presumption because there was "no rational connection between the fact proved [possession] and the ultimate fact [receipt in an interstate transaction] presumed. . . ." *Id.* at 467. Possession of a gun, the Court held, afforded "no reasonable ground for a presumption that its purchase or procurement was in interstate rather than intrastate commerce." *Id.* at 468. Because the Supreme Court in *Tot* authoritatively construed § 2(f) of the Federal Firearm Act, the predecessor to section 922(h), I believe that the phrase in section 922(h), "which has been shipped or transported in interstate or foreign commerce," must be construed in the same manner as the identical phrase, "which has been shipped or transported in interstate or foreign commerce," of section 2(f). Accordingly, I would hold, as the Supreme Court did in *Tot*, that the mere shipment of a weapon in interstate commerce at some time before purchase in an intrastate transaction is an insufficient nexus with interstate commerce to satisfy the requirements of section 922(h).

In *United States* v. *Bass*, 404 U.S. 336 (1971), the Supreme Court reiterated that it had construed authoritatively section 2(f) in *Tot* and stated that section 922(h) "apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation." *Id.* at 342-43. In *Bass*, the Court, in construing 18 U.S.C. § 1202(a), concluded that with respect to that statute "the Government meets its burden . . . if it demonstrates that the firearm received has previously traveled in interstate commerce," and observed that "this reading preserves a significant difference between the 'receipt' offenses under Title IV [containing section 922(h)] and Title VII [containing section 1202

(a)]." *Id.* at 350, & n. 18. Moreover, the Court observed that the government had not demonstrated that Congress, in enacting section 922(h) in 1968, in language identical to that of section 2(f) of the Federal Firearms Control Act, had intended to change and broaden its earlier construction of this language in *Tot*. The government has also failed to offer in connection with this appeal any proof of a Congressional change of intent.

Not only has the Supreme Court indicated that the "receipt" offense of section 922(h) is more limited than that defined by section 1202(a), but also this court has adopted a similar construction. In *United States* v. *Craven*, 478 F.2d 1329 (6th Cir.), *cert. denied*, 414 U.S. 866 (1973), *reh. denied*, appellant contended that the government had failed to demonstrate receipt in violation of section 922(h). We observed that the Supreme Court's interpretation of the interstate character of the receipt requirement in *Bass* "comport[ed] with the accepted interpretation of the predecessor statutes of § 922(h)," and "conclude[d] that 18 U.S.C. § 922(h) speaks only of the receipt of firearms or ammunition in interstate transportations and does not concern possessions at all." *Id.* at 1336. Applying this test, we affirmed the conviction because within a few days after the theft of a police officer's gun in Ohio, appellant was found in possession of it in Kentucky.

Finally, in *United States* v. *Ruffin*, 490 F.2d 557 (8th Cir. 1974), not cited by either party to this appeal, the court held that "for a receipt to be cognizable under § 922(h), the government must show that at the time the gun was received it was *part* of an interstate transportation." *Id.* at 560. Accordingly, when the evidence showed only that a gun, found in appellant's possession in Missouri, had been stolen seven months earlier in Illinois from an interstate common carrier, appellant's conviction had to be reversed. The evidence was deemed insufficient to show that receipt of the gun was part of an interstate transportation.

When the Supreme Court authoritatively construes a statute, and Congress preserves its original language in enacting suc-

cessor statutes, I believe that the scope of the statute's prohibition remains the same, in the absence of evidence that Congress intended identical language in a successor statute to mean something different from its meaning in the original statute. In this case, appellant's purchase of the weapon was a purely intrastate transaction even though the gun had once been shipped in interstate commerce from the manufacturer to the dealer where it came to rest before it was sold to appellant. This evidence is insufficient to demonstrate the connection with interstate commerce required by 18 U.S.C. § 922(h). Accordingly, I would reverse appellant's conviction.

APPENDIX-B

District of Kentucky
FILED
MAY 25 1973
AT JACKSON
DAVID T. McGARVEY
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

CRIMINAL NO. 10,339

UNITED STATES OF AMERICA — PLAINTIFF

VS

PEARL BARRETT — DEFENDANT

ORDER

On May 24, 1973 came the United States by Assistant United Attorney, Eldon Webb, the defendant in person and his attorney, Harold Garland Wells, and the jurors present as on May 23, 1973.

On motion of counsel for the defendant the rule as to separation of witnesses was invoked and all witnesses were excluded from the courtroom with the exception of Agent Walter Huffman, who was allowed to remain at counsel's table to assist the United States in the presentation of the case.

Mr. Webb read the Indictment to the jury and made an opening statement on behalf of the United States. Mr. Wells reserved an opening statement for the defendant.

The introduction of evidence on behalf of the United States was begun and concluded.

The hour for noon recess having arrived, the Court admonished the jurors and a recess until 12:30 P. M. was announced.

Following the recess came the United States attorneys, the defendant, his attorney in the absence of the jury and testimony was had on behalf of the defendant.

Later, the jury returned into open court and Mr. Wells made an opening statement on behalf of the defendant.

Thereupon evidence on behalf of the defendant was introduced and concluded.

Closing arguments were made to the jury by Mr. Wells for the defendant and by Mr. Webb for the United States.

The Court instructed the jurors and after the discharge of

Later, the jury returned into open court and in the presence of the attorney for the United States, the defendant, his attorney reported its verdict to-wit:

"We, the Jury, find the defendant Guilty

May 24, 1973 /s/ Chas H Tirey
(Foreman)"

Thereupon the Court inquired of counsel for the United States and counsel for the defendant if there was any question as to the form of the verdict, and counsel for both the plaintiff and the defendant having answered in the negative, thereupon the jury was discharged.

It was ORDERED that sentencing be deferred until June 11, 1973 at 9:30 A. M. at PIKEVILLE and the defendant's bond is to remain in full force and effect for appearance at Pikeville on June 11, 1973.

May 24, 1973

H. David Hermansdorfer, JUDGE

Copies: U. S. Attorney
5/25/73 Harold Garland Wells
mm

APPENDIX C

IN THE NAME AND BY THE AUTHORITY OF THE

COMMONWEALTH OF KENTUCKY

LOUIE B. NUNN

GOVERNOR OF THE COMMONWEALTH OF KENTUCKY

To all to Whom These Presents Shall Come, Greeting:

Whereas, It is represented to me that the conduct of PEARL BARRETT has been of an exemplary nature and merits the restoration of all civil rights lost by reason of conviction of a felony.

Now Know Ye, That in consideration of the premises and by virtue of the power vested in me by the Constitution, I do hereby grant unto the said PEARL BARRETT

ALL THE RIGHTS OF CITIZENSHIP

denied him in consequence of said judgment of conviction, and I direct that all officers of this State respect this restoration.

In testimony whereof, I have caused these letters to be made patent and the seal of the Commonwealth to be hereunto affixed. Done at Frankfort, the 20TH day of JUNE in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 78TH year of the Commonwealth.

Louie B. Nunn
By the Governor

Elmer Begley
Secretary of State
By Mary R. Galey
Assistant Secretary of State

Supreme Court, U. S.
APR 10 1975

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5566

PEARL BARRETT,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5566

PEARL BARRETT,

Petitioner,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Indictment	4
Jury Verdict	6
Order Deferring Sentencing	7
Sentence	9
Trial Transcript, Pages 55, 56, 57, 58 and 59 (excerpts)	11
Notice of Appeal	14
Opinion of Court of Appeals	16
Order of Supreme Court granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	28

RELEVANT DOCKET ENTRIES

Date Filed	Pleading
6-12-72	Indictment
10-24-72	Order: Counsel appointed
10-25-72	Order: On 10-24-72 defendant entered plea of not guilty.
11- 1-72	Order: On 10-25-73 defendant moved Court to Dismiss Indictment; parties to file briefs in support of their positions; case continued for trial until 11-6-72 at 9:30 A.M.; counsel for defendant authorized to incur travel expense & to subpoena witnesses at cost of the U.S. if it appears an evidentiary hearing is warranted.
11- 3-72	Defendant's Memorandum Brief
11- 3-72	Plaintiff's Memorandum of Law
11- 7-72	Order: On 11-6-72 hearing on defendant's motion to quash Indictment; motion overruled.
11- 8-72	Agreed Order: Trial continued to 5-21-73
5-24-73	Order: On 5-23-73 jury trial begun but not concluded; recessed until 5-24-73 at 9:30 A.M.
5-25-73	Order: On 5-24-73 jury trial resumed & concluded; Verdict: Guilty.
6-11-73	Acknowledgment of Court's Advice of Right to Appeal
6-11-73	Judgment & Commitment: On 6-11-73 at Pikeville, defendant sentenced to 3 years under provisions of Title 18, Section 4208(a)(2), USC.
6-19-73	Notice of Appeal
6-19-73	Designation of Record on Appeal

Date Filed	Pleading
7- 6-73	Motion of plaintiff for return of .32 caliber Smith & Wesson pistol used in commission of the crime herein.
7- 9-73	Order: Motion of plaintiff for return of .32 caliber Smith & Wesson pistol used in commission of the crime herein passed pending adjudication of merits of this case upon appeal.
7-19-73	Copy of Judgment & Commitment: On 7-12-73 defendant delivered to Springfield, Mos. Hosp. F.P. at Springfield, Mo.
7-24-73	Order: Extends time for completion of transcript until 8-28-73 & defendant shall have until 8-28-73 to file record on appeal.
7-24-73	Affidavit of Official Court Reporter
8-23-73	Reporter's Official Transcript of Proceedings at Hearing
8-23-73	Reporter's Official Transcript of Proceedings at Trial
	Envelope of plaintiff's exhibit #1. Plaintiff's exhibits 2 and 3 too bulky for mailing.
	Envelope of defendant's exhibit 1

UNITED STATES OF AMERICA
EASTERN DISTRICT OF KENTUCKY

I, Davis T. McGarvey, Clerk of the United States District Court for the Eastern District of Kentucky do hereby certify that the foregoing is the original record on appeal and relevant docket entries in the case of United States of America, plaintiff, versus Pearl Barrett, defendant, Criminal Action No. 10,339 on the Jackson Docket.

IN TESTIMONY WHEREOF, I have herewith subscribe my name and affixed the seal of the aforesaid Court of Lexington, this 28th day of August, 1973.

DAVIS T. MCGARVEY, Clerk
United States District Court

By: /s/ Julia A. Wallace
D. C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON DIVISION

No. 10,339

THE UNITED STATES OF AMERICA

vs.

PEARL BARRETT

INDICTMENT

T. 18, Sec. 922(h), USC—Knowingly received and possessed a firearm in commerce after having been convicted of a felony.

1 Count.

A true bill,

/s/ [Illegible]
Foreman.

Filed in open court this ——— day of ————————, A. D. 19—.

————————————
Clerk.

Bail, $————————

[Filed June 12, 1972, Eastern District of Kentucky, at Catlettsburg, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

No. 10,339

(Title 18, Sec. 922(h), USC)

[Filed June 12, 1972, Eastern District of Kentucky, at Catlettsburg, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

vs.

PEARL BARRETT

THE GRAND JURY CHARGES:

That on or about the 1st day of April, 1972, in Owsley County, in the Eastern District of Kentucky,

PEARL BARRETT

having been convicted of a felony by a court of the Commonwealth of Kentucky, that is, the Madison Circuit Court, of housebreaking on or about January 17, 1967, knowingly received and had in his possession a firearm, to wit, a .32 caliber Smith & Wesson revolver, model 31-1, serial number H33141, which had been transported in interstate commerce.

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
JACKSON

No. 10,339

[Filed May 24, 1973, Eastern District of Kentucky, at Jackson, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

PEARL BARRETT

VERDICT

We, the Jury, find the defendant Guilty.

May 24, 1973
(Date)

/s/ Chas. H. Tirey
(Foreman)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

Criminal No. 10,339

[Filed May 25, 1973, Eastern District of Kentucky, at Jackson, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PEARL BARRETT, DEFENDANT

ORDER

On May 24, 1973 came the United States by Assistant United Attorney, Eldon Webb, the defendant in person and his attorney, Harold Garland Wells, and the jurors present as on May 23, 1973.

On motion of counsel for the defendant the rule as to separation of witnesses was invoked and all witnesses were excluded from the courtroom with the exception of Agent Walter Huffman, who was allowed to remain at counsel's table to assist the United States in the presentation of the case.

Mr. Webb read the Indictment to the jury and made an opening statement on behalf of the United States. Mr. Wells reserved an opening statement for the defendant.

The introduction of evidence on behalf of the United States was begun and concluded.

The hour for noon recess having arrived, the Court admonished the jurors and a recess until 12:30 P. M. was announced.

Following the recess came the United States attorneys, the defendant, nis attorney in the absence of the jury and testimony was had on behalf of the defendant.

Later, the jury returned into open court and Mr. Wells made an opening statement on behalf of the defendant.

Thereupon evidence on behalf of the defendant was introduced and concluded.

Closing arguments were made to the jury by Mr. Wells for the defendant and by Mr. Webb for the United States.

The Court instructed the jurors and after the discharge of the alternate juror, the jury retired to the juryroom to consider the case.

Later, the jury returned into open court and in the presence of the attorney for the United States, the defendant, his attorney reported its verdict to-wit:

"We, the Jury, find the defendant Guilty

May 24, 1973

/s/ Chas. H. Tirey,
(Foreman)"

Thereupon the Court inquired of counsel for the United States and counsel for the defendant if there was any question as to the form of the verdict, and counsel for both the plaintiff and the defendant having answered in the negative, thereupon the jury was discharged.

It was ORDERED that sentencing be deferred until June 11, 1973 at 9:30 A. M. at PIKEVILLE and the defendant's bond is to remain in full force and effect for appearance at Pikeville on June 11, 1973.

May 24, 1973

/s/ H. David Hermansdorfer
H. DAVID HERMANSDORFER,
Judge

Copies: U. S. Attorney
Harold Garland Wells
5/25/73

/s/ M.F.B.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
JACKSON

No. 10,339

[Filed June 11, 1973, Eastern District of Kentucky, at Pikeville, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

PEARL BARRETT

JUDGMENT AND COMMITMENT

On this 11 day of June, 1973 at Pikeville came the attorney for the government and the defendant appeared in person and by Harold Garland Wells, heretofore appointed by the Court to represent him.

IT IS ADJUDGED that the defendant has been convicted upon verdict of guilty of the offense of Receiving and possessing firearm transported in interstate commerce, having been convicted of a felony in violation of Title 18, section 922(h), United States Code and the court having asked the defendant whether as charged in the indictment he or his attorney has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted. Thereupon the Probation Officer submitted a pre-sentence report to the Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his

authorized representative for imprisonment for a period of Three (3) Years—Provisions of Title 18, Section 4208(a)(2), United States Code.

IT IS ADJUDGED that the defendant be imprisoned until he is otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

June 11, 1973.

/s/ H. David Hermansdorfer,
United States District Judge

The Court recommends commitment to: _____
_____.

(Signed) _____ (By) _____
Deputy Clerk

[55] Ladies and gentlemen, while you are out of the courtroom, remember the admonition of the Court.

(A recess was had from 10:45 a.m. to 10:55 a.m.)

(The following proceedings were had in chambers)

MR. WELLS: Comes the defendant by counsel at the close of the Government's case and moves the Court to direct a verdict of acquittal for the defendant on the grounds that the Government has failed to prove a case under the provisions of Title 18 USC, 922(g) and (h), particularly, 922(h), which is the statute upon which the Government is prosecuting in this case. The motion is based on the authority of the Supreme Court case decision in the United States of America vs. Bass, which bears the citation 404 US, 342. In this opinion the Supreme Court states in part, (reading) However, Title IV apparently does not reach possessions or interstate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate [56] transportation. Their reference thereto is footnote 10. Also, (reading) "The act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported in interstate."

Of course, the feeling of counsel for the defendant is that this is the highest authority in the land and certainly is the authority which the defendant would have a right to rely on. I think clearly that the Government has not made a case as defined in this Supreme Court decision. It does not seem to me that any justice we could get on any other basic principle of law would justify a conviction in face of this opinion.

THE COURT: 922(h) is receipt. Title 18 designates the possession or receipt of a firearm by four classes of persons, one of whom is a person who is under indictment or who has been convicted in court of a felony. The last portion of the statute relates to firearms or ammunition

which has been shipped in [57] interstate or foreign commerce. This Court believes that it is bound by the opinion of the Sixth Circuit Court of Appeals in the case of the United States vs. Roy Ernest Day. With respect to the argument made by counsel, I would cite the language which appears at page 6 of the slip opinion. (reading) There can be no doubt that the Congress intended, and through its words accomplished, the regulation of unlicensed intrastate sales of firearms. Three other circuits have been asked to impose the language of Bass to 922(a)(1) and have found, as we do, that it is inapplicable.

I have no doubt in my mind that under the language of the Day case, the only thing this Court can do is to overrule the motion of the defendant and to hold that the United States in presenting its evidence, whether believed by the jury or not, separates the question by presenting evidence that the defendant is a person who has previously been convicted of a felony and who received the gun, which was established by the evidence, to have been manufactured in the state of Massachusetts, transported to the state of North Carolina and [58] then transported into the state of Kentucky and sold by the designated firearms dealer to the defendant.

MR. WELLS: I don't want to be labor it, but if I might, I would like to attempt to comment on the points the Court overruled. Counsel for the defendant, of course, acknowledges the authority cited by the Court to sustain its decision. However, counsel for the defendant does not think that the case which was cited by the Court is one which was handed down after the time of the alleged offense by this defendant. It does seem to me that the decision of the Court should be guided by what the best law period is to be at the time that this alleged offense was committed. If we are dealing in transactions which were handed down at a time later than that, we are in effect, in my opinion, dealing in something of a nature of pay no attention to the law. To me the language in the United States vs. Bass surely includes this type of a situation in the provision of 922(h).

MR. WEBB: First, I would say that Bass does not deal with 922(h) at all, it's a [59] 1202(a)(1) case. The interpretation of 922(h) is what we think is applicable to this case to the extent that it says what we have proved here and we have proven the movement of this fire arm in interstate right into the hands of this defendant.

(Discussion had off-record)
(The following discussion was had on record)

THE COURT: Let the record show that Mr. Wells for the defense has raised a question as to whether or not he will be permitted to argue the evidence introduced this far in the case to the jury, that the transaction amounted to nothing more than an intrastate transaction. The United States has responded indicating that this fact is subervious argument under the evidence introduced to this point and would likely mislead the jury about the issues in the case.

Mr. Wells, is that your view?

MR. WELLS: Yes, sir.

THE COURT: Mr. Webb, is that your view?

MR. WEBB: Yes, sir.

U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON DIVISION

Criminal No. 10,339

[Filed June 19, 1973, Eastern District of Kentucky, at Lexington, Davis T. McGarvey, Clerk, U.S. District Court]

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PEARL BARRETT, DEFENDANT

NOTICE OF APPEAL

Take notice that Pearl Barrett of Booneville, Kentucky does by his attorney, Harold Garland Wells, P.O. Box 621, Hazard, Kentucky, appeal to the U. S. Court of Appeals for the 6th district from a judgment of this court entered in Pikeville, Kentucky on June 11, 1973 wherein he was sentenced to a term of three years on indictment no. 10,339 on the Jackson docket. The appellant, Pearl Barrett, by counsel further states that he was by the judgment herein above referred to sentenced to said term of three years on an indictment charging him with an offense prohibited by 18 USC 922(H) in that having been previously convicted of a felony by a Court of the Commonwealth of Kentucky, he did on April 1, 1972, knowingly receive and have in his possession a fire arm, to wit, a .32 caliber Smith and Wesson revolver, model 31-1, serial number H33141, which had been transported in interstate commerce.

Said Pearl Barrett, appellant herein, is presently being confined in the Pike County Kentucky Jail.

/s/ Harold Garland Wells
Attorney for Appellant

This will certify that true copies of the foregoing notice and attached designation were mailed postage prepaid to Eldon Webb, Assistant United States Attorney, Federal Building, Lexington, Kentucky this 18th day of June, 1973.

/s/ Harold Garland Wells
Attorney for appellant

Copies to:

U.S. Attorney
Clerk, Court of Appeals
6-19-73

/s/ M.R.H.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1872

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PEARL BARRETT, DEFENDANT-APPELLANT

Appeal from United States District Court
for the Eastern District of Kentucky

Decided and Filed October 18, 1974.

Before WEICK, EDWARDS and MCCREE, Circuit Judges.

WEICK, J. delivered the opinion of the Court, in which EDWARDS, J., joined. MCCREE, J. (pp. 9-12) filed a dissenting opinion.

WEICK, Circuit Judge. The indictment charged that appellant Barrett, having been convicted in the state court of a felony, housebreaking, knowingly received and had in his possession a firearm, towit, a .32 caliber Smith and Wesson revolver, which had been transported in interstate commerce, 18 U.S.C. § 922(h). He was tried and convicted by a jury and was sentenced to three years' imprisonment.

Barrett had purchased the revolver on April 1, 1972, in a Western Auto Store in Booneville, Kentucky. Western

Auto Store had received the gun on March 5, 1972 from Gastonia, North Carolina.

About one-half hour after Barrett had purchased the revolver he was observed by two deputy sheriffs driving his automobile south of Booneville. After the officers chased his car a short distance he stopped, and they arrested him for driving while intoxicated. One of the deputies then noticed the firearm on the floor board on the driver's side of Barrett's car; it was loaded.

Barrett had been convicted previously on January 17, 1967, of the housebreaking charge, and was sentenced to two years' imprisonment. On June 20, 1969, after Barrett served his sentence, the Governor of Kentucky signed a partial pardon restoring Barrett only to his civil rights.

Barrett contended in the District Court and here that his purchase of the firearm from the dealer was an intrastate transaction, not within the scope of Section 922 (h), and that, in any event the document which he received from the Governor of Kentucky constituted a full pardon and therefore his previous conviction had been wiped out.

I

THE STATUTE

Section 922(h) provides in relevant part:

> (h) It shall be unlawful for any person—
>
> (1) Who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This section is part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.

It would appear to us that under the Government's proof this statute has been literally complied with. The

firearm indeed had been transported in interstate commerce, from North Carolina to Kentucky, less than one month before Barrett received it.

Barrett relies on dictum contained in the majority opinion in *United States* v. *Bass*, 404 U.S. 336 at 342-343 (1971). *Bass* involved a prosecution under Title VII of the Omnibus Crime Control and Safe Streets Act, while the prosecution in the present case was under Title IV of the Act. The dictum is as follows:

> . . . [H]owever, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation.[10]

Footnote 10 reads as follows:

> Title IV, 18 U. S. C. §§ 922(g) and (h), is a modified and recodified version of 15 U. S. C. §§ 902(e) and (f) (1964 ed.), 75 Stat. 757, which in turn amended the original statute passed in 1938, 52 Stat. 1250, 1251. Each amendment enlarged the group of people coming within the Act's substantive prohibitions against transportation or receipt of firearms in interstate commerce. The wording of the substantive offense has remained identical, although the original Act had a provision that possession of a firearm "shall be presumtive evidence that such firearm or ammunition was shipped or transported or received [in interstate or foreign commerce]." That presumption was struck down in *Tot* v. *United States*, 319 U.S. 463 (1943), and the Court there noted:
>
> "[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate." *Id.*, at 466. While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that the 1968 Act changed the prior approach to the "receipt" offense. See, *e. g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968). (404 U.S. at 343)

By reference to *Tot*, the complete sentence, of which the foregoing quotation is a part, is as follows:

> Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. (319 U.S. at 466).

The Court in *Tot* further said:

> The Government agrees that this construction is correct. (*Id.* at 466).

It therefore appears that the Government conceded that the construction of the statute by the lower courts was correct, and that the Supreme Court accepted the concession without discussion. In *Tot* all that the Court decided was that the presumptive provision in the Act was invalid.

In the present case the Government has made no such concession, and we are required to decide the issue. Footnote 10 in *Bass* recognized that "the reach of Title IV itself is a question to be decided finally some other day . . . ."[1]

It is our opinion that there is no ambiguity in Section 922(h) of the Act. It means exactly what it says.

Barrett did indeed receive a firearm which had been transported in interstate commerce. Such receipt violated the plain language of the statute. It was not necessary for the Government to prove that Barrett received the firearm from the common carrier.

---

[1] The dictum in *Bass* was discussed in our decision in *United States* v. *Craven*, 478 F.2d 1329, 1336 (6th Cir. 1973), where there had been a second and more recent transportation of the firearm in interstate commerce, which we held was sufficient to support a conviction under Section 922(h).

II

THE PARDON

It will be noted that Section 922(h) contains no exemption for any one who has been pardoned.

Barrett in the District Court relied on the exemption contained in 18 U.S.C. § 1203 Appendix, which appears in 18 U.S.C. § 3531 to End, page 496, and reads as follows:

> § 1203 Exemptions
>
> This title shall not apply to—
>
> (1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and
>
> (2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

Section 1203 is part of Title VII of the Act and would not appear to apply to an indictment under Title IV of the Act. But if the exemption did apply, it would not help Barrett because the alleged pardon did not authorize him to receive the firearm.

The pardon reads as follows:

> To all to Whom These Presents Shall Come, Greeting:
>
> Whereas, It is represented to me that the conduct of PEARL BARRETT has been of an exemplary nature and merits the restoration of all civil rights lost by reason of conviction of a felony.
>
> Now Know Ye, That in consideration of the premises and by virtue of the power vested in me by the Constitution, I do hereby grant unto the said PEARL BARRETT

> denied him in consequence of said judgment of conviction, and I direct that all officers of this State respect this restoration.
>
> In Testimony Whereof, I have caused these letters to be made patent and the seal of the Commonwealth to be hereunto affixed. Done at Frankfort, the 20th day of June in the year of our Lord one thousand nine hundred and 69 and in the one hundred and 78th year of the Commonwealth.
>
> [SEAL]
>
> /s/ Louie B. Nunn
> By the Governor

All that the pardon purported to do was to restore "all civil rights lost by reason of conviction of a felony."

Section 77 of the Kentucky Constitution provides:

> He [the Governor] shall have the power to . . . commute sentences, grant reprieves and pardons, except in case of impeachment.

In *Herndon* v. *Commonwealth*, 105 Ky. 197 at 200 (1899), the Court quoted the following language taken from *Mount* v. *Com.*, 2 Duv., 93, with respect to a Section 77 pardon:

> The pardon relieved the convict of the entire penalty incurred by the offense pardoned, and nothing else or more.

The civil rights to which Barrett was restored by the pardon were the right to suffrage provided for in Section 145 of the Kentucky Constitution, the right to hold public office as provided in Section 150 of the Constitution, and the right to serve on a jury, provided in K.R.S. 29.025. These constitutional and statutory provisions expressly state that their civil rights are restored by the pardon.

The differences between a pardon merely restoring civil rights and a pardon relieving a convict of the pen-

alty are pointed out in *Arnett* v. *Stumbo*, 287 Ky. 433, 435-436, 153 S.W.2d 889 (1941), where the Court stated:

> It will be perceived that persons losing their right of citizenship whereby they become disqualified to exercise the right of suffrage under the voters section "may be restored to their civil rights by executive pardon"; whilst the disqualification to seek and hold office under the office holding section "may be removed by pardon of the governor." There is no language in either of those sections expressly, inferentially or otherwise touching or dealing with a cancellation by any chief executive of the corporal punishment inflicted upon a convict for violation of any criminal law, the power to grant which is contained in Section 77 of our Constitution. The executive clemency provided for by both of the sections referred to (145 and 150) goes no farther than to permit the chief executive to restore lost rights of citizenship to the one convicted so that he might thereafter possess such rights as though no conviction had ever occurred. The rights so lost pertain exclusively to participation in the selection and the holding of a public office in the Commonwealth each of which is taken away by the sections of the Constitution referred to, but which may be restored by executive clemency as therein provided. Clearly, therefore, such restoration relates solely to the qualifications of those who seek and obtain public office within it.

The Court further said:

> . . . [The Governor] is expressly authorized by the sections referred to [Secs. 145 and 150] to lift the disabilities prescribed in them from the shoulders of the convict and to restore him to full and complete rights of citizenship. Such authority is in addition and supplementary to the strict pardoning power provided for by Section 77 of the same instrument. (287 Ky. at 437).

In *Illinois Cent. R.R.* v. *Bosworth*, 133 U.S. 92, 103 (1890), the Supreme Court stated the effect of a full pardon:

> In the opinion of the court in the case of *Ex parte Garland*, 4 Wall. 333, 380, the effect of a pardon is stated as follows, to wit: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. . . ."

In 67 C.J.S., *Pardons*, § 1(b), at 562-563, the several kinds of pardons are discussed:

> There are several kinds of pardons; thus a pardon may be full or partial, absolute or conditional. A pardon is full when it freely and unconditionally absolves the person from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided; it is partial where it remits only a portion of the punishment or absolves from only a portion of the legal consequences of the crime. (Footnotes omitted).

It is clear to us that the pardon in the present case was not a full pardon, but only a partial pardon. There was no remission of guilt, nor of the penalty. The only thing accomplished by the pardon was a restoration of civil rights under Kentucky law.

The rule of *United States* v. *Renner*, 496 F.2d 922 (6th Cir., 1974), should be confined to the facts of that case. The present case involved a question of Kentucky law relating to pardons, and appellant is bound by Kentucky law.

Affirmed.

McCREE, Circuit Judge (concurring in part and dissenting in part). I concur in that part of the court's opinion holding that appellant cannot avail himself of the exemption contained in 18 U.S.C. § 1203 Appendix, but only because that exemption is not available to a defendant tried for violation of 18 U.S.C. § 922(h). That exemption applies only to convicted felons charged with receipt of firearms contrary to 18 U.S.C. § 1202. Appellant was indicted under a similar statute, 18 U.S.C. § 922(h), also for receipt of a firearm. The exemption applicable to this offense, provided for in 18 U.S.C. § 925, requires a convicted felon who desires to acquire a firearm contrary to the provisions of § 922(h) to secure the express permission of the Secretary of the Treasury, not a gubernatorial pardon.

I respectfully dissent from that part of the court's opinion holding that the government established that appellant's purchase of the gun from a local dealer satisfied the interstate commerce requirement of 18 U.S.C. § 922(h). In *Tot* v. *United States*, 319 U.S. 463 (1943), the Supreme Court was presented with two cases that required it to construe and to determine the validity of the predecessor statute to section 922 which provided:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, in violation of this Act. *Id.* at 464, *quoting* C. 850. 52 Stat. 1250, 1251; 15 U.S.C. § 902(f).

The Supreme Court observed in its opinion that two federal courts of appeals, including this court, had held that "the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which at some prior time, have been transported interstate." *Id.* at 466. The

Court adopted this construction as authoritative in order to determine the validity of the presumption that Congress had created in the second portion of the statute. It invalidated the presumption because there was "no rational connection between the fact proved [possession] and the ultimate fact [receipt in an interstate transaction] presumed. . . ." *Id.* at 467. Possession of a gun, the Court held, afforded "no reasonable ground for a presumption that its purchase or procurement was in interstate rather than intrastate commerce." *Id.* at 468. Because the Supreme Court in *Tot* authoritatively construed § 2(f) of the Federal Firearm Act, the predecessor to section 922(h), I believe that the phrase in section 922(h); "which has been shipped or transported in interstate or foreign commerce," must be construed in the same manner as the identical phrase, "which has been shipped or transported in interstate or foreign commerce," of section 2(f). Accordingly, I would hold, as the Supreme Court did in *Tot*, that the mere shipment of a weapon in interstate commerce at some time before purchase in an intrastate transaction is an insufficient nexus with interstate commerce to satisfy the requirements of section 922(h).

In *United States* v. *Bass*, 404 U.S. 336 (1971), the Supreme Court reiterated that it had construed authoritatively section 2(f) in *Tot* and stated that section 922(h) "apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation." *Id.* at 342-43. In *Bass*, the Court, in construing 18 U.S.C. § 1202(a), concluded that with respect to that statute "the Government meets its burden . . . if it demonstrates that the firearm received has previously traveled in interstate commerce," and observed that "this reading preserves a significant difference between the 'receipt' offenses under Title IV [containing section 922(h)] and Title VII [containing section 1202(a)]." *Id.* at 350, & n. 18. Moreover, the Court observed that the government had not demonstrated that Congress, in enacting section 922(h) in 1968, in language identical to that of section

2(f) of the Federal Firearms Control Act, had intended to change and broaden its earlier construction of this language in *Tot*. The government has also failed to offer in connection with this appeal any proof of a Congressional change of intent.

Not only has the Supreme Court indicated that the "receipt" offense of section 922(h) is more limited than that defined by section 1202(a), but also this court has adopted a similar construction. In *United States* v. *Craven*, 478 F.2d 1329 (6th Cir.), *cert. denied*, 414 U.S. 866 (1973), *reh. denied*, appellant contended that the government had failed to demonstrate receipt in violation of section 922(h). We observed that the Supreme Court's interpretation of the interstate character of the receipt requirement in *Bass* "comport[ed] with the accepted interpretation of the predecessor statutes of § 922(h)," and "conclude[d] that 18 U.S.C. § 922(h) speaks only of the receipt of firearms or ammunition in interstate transportations and does not concern possessions at all." *Id.* at 1336. Applying this test, we affirmed the conviction because within a few days after the theft of a police officer's gun in Ohio, appellant was found in possession of it in Kentucky.

Finally, in *United States* v. *Ruffin*, 490 F.2d 557 (8th Cir. 1974), not cited by either party to this appeal, the court held that "for a receipt to be cognizable under § 922(h), the government must show that at the time the gun was received it was *part* of an interstate transportation." *Id.* at 560. Accordingly, when the evidence showed only that a gun, found in appellant's possession in Missouri, had been stolen seven months earlier in Illinois from an interstate common carrier, appellant's conviction had to be reversed. The evidence was deemed insufficient to show that receipt of the gun was part of an interstate transportation.

When the Supreme Court authoritatively construes a statute, and Congress preserves its original language in enacting successor statutes, I believe that the scope of the statute's prohibition remains the same, in the absence of evidence that Congress intended identical language in a successor statute to mean something different from its

meaning in the original statute. In this case, appellant's purchase of the weapon was a purely intrastate transaction even though the gun had once been shipped in interstate commerce from the manufacturer to the dealer where it came to rest before it was sold to appellant. This evidence is insufficient to demonstrate the connection with interstate commerce required by 18 U.S.C. § 922(h). Accordingly, I would reverse appellant's conviction.

SUPREME COURT OF THE UNITED STATES

No. 74-5566, OCTOBER TERM, 1974

PEARL BARRETT, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition which reads as follows:

"1. Whether Title 18 U.S.C. Section 922 (h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm."

February 18, 1975

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 572504 136

SUPREME COURT, U.S.

No. 74-5566

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

PEARL DARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5566

PEARL BARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 922(h), which, inter alia, makes it unlawful for a convicted felon to receive a firearm that has been transported in interstate commerce, does not encompass the intrastate purchase of a revolver from a retailer who had obtained the weapon from an out-of-state distributor, and that due process was violated by the district court's refusal to submit to the jury the question of petitioner's intent to violate the statute and by the government's failure to prove that petitioner knew he was prohibited from receiving the revolver.

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner, having previously been convicted in state court of housebreaking, a felony punishable by imprisonment for more than one year, was convicted of receiving a firearm which had been transported in interstate commerce, in violation of 18 U.S.C. 922(h).[1] Petitioner was sentenced to a term of three years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed, one judge dissenting (Pet. App. A; 504 F.2d 629).

The undisputed evidence showed that petitioner, a resident of Booneville, Kentucky, purchased a .32 caliber revolver from a retailer in Booneville, Kentucky (Tr. 37, 40-41, 77). The revolver had been manufactured in Springfield, Massachusetts, and was received by the retailer approximately three weeks earlier from a distributor in North Carolina. The sale to petitioner was the first retail sale of the weapon (Tr. 39-40, 42, 52). About 45 minutes after he had purchased the revolver, petitioner was arrested for driving while intoxicated. The police found the fully-loaded weapon on the floorboard of the car on the driver's side (Tr. 20-21, 78). Petitioner admitted that in January 1967, he had been convicted of housebreaking and had been sentenced to two years' imprisonment for that offense (Tr. 73-79).

The dealer who sold petitioner the revolver testified on cross-examination that he failed to present petitioner with the Federal Firearms Transaction Record, Form 4473, and failed

---

[1] Title 18 U.S.C. 922(h) provides that "[i]t shall be unlawful for any person--

(1) who has been convicted in any Court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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to have petitioner answer the questions and sign the form, as required by 26 C.F.R. 178.124(a) and (c) (Tr. 45).[2] A question on the form asks whether the purchaser is a convicted felon and states that such a person may not purchase or possess a firearm. Petitioner testified that had the dealer asked him about the previous conviction, he would have acknowledged it (Tr. 67).

Petitioner testified, outside the presence of the jury, that in June 1969, he received from the Commonwealth of Kentucky a document (Pet. App. C 30) restoring his civil rights lost by reason of the state felony conviction (Tr. 64-65).[3] Petitioner testified that he believed the document permitted him to possess anything that any other citizen is allowed to possess, including a firearm (Tr. 66). The district court held the foregoing testimony to be inadmissible as evidence of petitioner's intent because 18 U.S.C. 922(h) does not require proof of intent (Tr. 68-69).

1. Petitioner contends that 18 U.S.C. 922(h) does not encompass the intrastate purchase of a new revolver from a retailer who had obtained the weapon from an out-of-state distributor less than a month before the sale. Contrary to petitioner's assertion, however, the reach of 18 U.S.C. 922(h) was not limited by this Court in United States v. Bass, 404 U.S. 336, 344, n. 10, to interstate transactions.[4] Whatever the outer boundaries of the statute's reach, petitioner's action in receiving a revolver which had been transported three weeks before in interstate commerce clearly violated the plain language of the statute, which prohibits convicted felons from receiving any firearm which "has been shipped or transported in interstate commerce" (emphasis supplied). Cf. United States v. Huddleston, 472 F.2d 592, 593 (C.A. 9), affirmed, 415 U.S. 814. Petitioner's narrow construction of the statute would restrict its application to instances where convicted felons had ordered firearms directly from an out-of-state distributor, and would exclude from coverage any and all face-to-face retail transactions (since face-to-face transactions could never be interstate). But surely Congress did not intend the broad language of Section 922(h) to have such narrow scope.[5]

2/ Petitioner purchased the revolver at about 5:15 on a Saturday night, making only a partial payment on the price; the dealer testified that he asked petitioner to return to the store on Monday, the next working day, to fill out the necessary papers, meaning the finance papers and the Firearms Transaction Form. However, the dealer admitted that he had not specifically mentioned the Firearms Transaction Form to petitioner (Tr. 47).

3/ Prior to trial and in the court of appeals petitioner contended that the restoration of rights document obviated the felony conviction and removed him from the class of persons subject to 18 U.S.C. 922(h). This contention was rejected by the district court and the court of appeals (Pet. App. A 20-23), and has not been pressed by petitioner.

4/ The government's concession in Tot v. United States, 319 U.S. 463, 466, referred to by the Court in Bass, that 15 U.S.C. 902(f) and (h) (the predecessor to 18 U.S.C. 922(h)) did not extend to the receipt in an intrastate transaction of firearms which had been transported in interstate commerce was based upon the government's interpretation of congressional intent in passing the 1938 statute. The present statute, however, was enacted in 1968. Case law regarding the reach of Congress' legislative jurisdiction under the commerce clause developed substantially between 1938 and 1968. Compare Hammer v. Dagenhart, 247 U.S. 251, 268-277 (1918), and Brooks v. United States, 267 U.S. 432, 439 (1925), with United States v. Darby, 312 U.S. 100, 117-123 (1941), and Wickard v. Filburn, 317 U.S. 111, 118-129 (1942). See also Perez v. United States, 402 U.S. 146; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-258. Therefore, as the court recognized in Bass, "the reach of Title IV [Section 922(h)] is a question to be decided finally some other day" (404 U.S. at 343, n. 10).

5/ Had Congress intended 922(h) to cover only the direct receipt of a weapon still moving in interstate commerce, it would have used language such as that in Section 922(j) which prohibits, inter alia, the knowing receipt of a stolen firearm "which is moving in, which is a part of, or which constitutes" interstate commerce.

Nor is there now any question that Congress has the power to regulate such intrastate transactions having a bearing on interstate commerce. "The power of Congress *** extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of *** the exercise of the granted power of Congress to regulate interstate commerce." (United States v. Darby, 312 U.S. 100, 118).

Nor are the circuits in conflict on this issue, as petitioner maintains. United States v. Ruffin, 490 F.2d 557, 559-560 (C.A. 8), cited by petitioner and by the dissenting judge in the court of appeals (Pet. 8, Pet. App. A 26), is factually distinguishable from the instant case. In Ruffin, the evidence showed that a gun found in the defendant's possession in Missouri had been stolen seven months earlier in Illinois. There was no evidence that the defendant had received the weapon from anyone directly engaged in interstate commerce. Indeed, the defendant's receipt of the weapon could well have been the last of many solely intrastate transfers. In the instant case, however, it is undisputed that petitioner received the revolver directly from one engaged in the interstate business of firearm sales. Accordingly, petitioner's receipt occurred at the end of the weapon's interstate journey. In fact, in contrast to Ruffin, the sole reason that the firearm in the instant case was put into interstate commerce was for the purpose of effecting the retail sale at the end of its interstate journey.

In United States v. Craven, 478 F.2d 1329, 1336-1337 (C.A. 6), certiorari denied, 414 U.S. 866, on which petitioner also relies, it was not necessary that the court reach the instant question because the facts of the case permitted an inference that the firearm had been transported in interstate commerce by the defendant himself. Insofar as dictum in Craven may conflict with the Circuit's subsequent holding in the instant case, it is a matter for resolution by the Sixth Circuit. Wisniewski v. United States, 353 U.S. 901.

2. Petitioner also contends that due process was violated by the district court's refusal to submit to the jury the question of petitioner's intent to violate the statute and the government's failure to prove that petitioner knew he was prohibited from receiving the revolver. As petitioner concedes (Pet. 9), however, scienter is not an element of the offense defined by Section 922(h). Cf. United States v. Freed, 401 U.S. 601, 607-610; United States v. Jones, 481 F.2d 653, 654 (C.A. 2); United States v. Ruisi, 460 F.2d 153, 156-157 (C.A. 2), certiorari denied, 409 U.S. 914. Even if petitioner purchased the revolver under the mistaken belief that he was legally entitled to do so, therefore, the conviction would still be proper. Cf. United States v. Dotterweich, 320 U.S. 277, 284-285.

Lambert v. California, 355 U.S. 225, 229 and United States v. Renner, 496 F.2d 922, 926 (C.A. 6), cited by petitioner (Pet. 10-11), are inapposite. In Lambert this Court held that scienter was a necessary element of a city ordinance making it a crime for a convicted felon to remain in Los Angeles for more than five days without registering with the city. The act of remaining in a city was, however, one which is wholly passive and one which the average citizen would not have suspected to require registration. To the contrary, the purchase of a handgun is an act of volition which the average citizen would expect to entail federal, state, and local regulation. Moreover, the possible injustice of subjecting an unwitting violator to a penalty for purchasing such a weapon is clearly outweighed

by the danger of exposing citizens to weapons in the hands of convicted felons. Cf. United States v. Balint, 258 U.S. 250, 254.[6] By the same token Renner's requirement that the prosecution prove, as an element of the offense, that the defendant knew he previously had been indicted or convicted at the time he received the firearm does not conflict with the instant case. Here, petitioner knew at the time he purchased the firearm that he had been convicted of a crime punishable by a term of imprisonment exceeding one year. It was his responsibility, before he purchased a hand gun, to ascertain that the restoration of civil rights in the state pardon did not restore his right to purchase a firearm under federal law. Cf. United States v. Balint, supra, 258 U.S. at 254.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

6/ Nor does the failure of the dealer to have petitioner execute a Firearms Transaction Record excuse petitioner's violation of Section 922(h). Such a holding would mean that firearms dealers, by their negligence or otherwise, could confer the right to possess firearms upon those denied that right by Congress.

7/ Even if the decision of the Sixth Circuit in Renner were in conflict with the circuit's decision in the instant case, that is a matter for resolution by the Sixth Circuit.

Supreme Court, U. S.
FILED
APR 10 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-5566

PEARL BARRETT,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE SCOPE OF TITLE 18 U.S.C. 922(h) DOES NOT EXTEND TO THOSE PERSONS WHO ARE MERELY IN POSSESSION OF A FIREARM, AND WHO HAVE NOT BEEN INVOLVED WITH, OR PARTICIPATED IN, THE INTERSTATE TRANSPORTATION OF THAT FIREARM.

A. Petitioner's acquisition of the firearm here in question was purely an intrastate transaction. 5

B. Title 18 U.S.C. Section 922(h) does not apply to purely intrastate sales or possessions; rather, it deals with interstate transportations and trafficking of firearms and dangerous weapons 7

CONCLUSION 17

TABLE OF AUTHORITIES

Cases:

M'Culloch v. Maryland, 4 Wheat. 316, 4 L.Ed 579 (1819) 8

Perez v. United States, 402 U.S. 146 (1971) 9

Tot v. United States, 319 U.S. 463 (1943) 13, 14

	Page
United States v. Bass, 404 U.S. 336 (1971)	2, 13, 14
United States v. Colicchio, 470 F.2d 977 (4th Cir., 1972)	11
United States v. Craven, 478 F.2d 1329 (6th Cir., 1973)	12, 14
United States v. Day, 467 F.2d 562 (6th Cir., 1973)	8-9
United States v. Hornbeck, 489 F.2d 1325 (7th Cir., 1973)	8
United States v. Lebman, F.2d 68 (5th Cir., 1972)	7-8, 10-11
United States v. Nelson, 458 F.2d 556 (5th Cir., 1972)	10
United States v. Petrucci, 486 F.2d 329 (9th Cir., 1973)	8
United States v. Ruffin, 490 F.2d 557 (8th Cir., 1974)	2, 11-12, 14
Other Authorities:	
Senate Report #1097, 2 U.S. Code, Congressional and Administrative News, pp. 2112-2248 (1968)	14-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-5566

PEARL BARRETT,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

OPINION BELOW

The opinion of the Sixth Circuit Court of Appeals reported at 504 F.2d 629 (1974), and is reproduced in the Appendix. A copy of the verdict and orders of the District Court for the Eastern District of Kentucky is also contained in the Appendix.

JURISDICTION

The judgment of the United States District Court for the Eastern District of Kentucky, Jackson Division, was entered against petitioner on May 24, 1973 convicting him of receiving and possessing a firearm transported in interstate commerce, having been convicted of a felony, in violation of Title 18, Section 922(h), United States Code. The United States Court of Appeals for the Sixth Circuit affirmed the conviction on October 18, 1974, stating that there was no ambiguity in Section 922(h), and that the United States did not have to prove that petitioner himself was directly involved in the interstate transportation of the firearm. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 and Part V of the Rules of this Court; and more specifically because the Court of Appeals has rendered a decision which is in conflict with other Courts of Appeals on the same matter, namely the Eighth Circuit Court of Appeals' decision in *United States v. Ruffin*, 490 F.2d 557 (8th Cir., 1974); and in addition, the decision in this matter is in conflict with the Supreme Court's finding in *United States v. Bass*, 404 U.S. 336 (1971).

QUESTION PRESENTED

Whether Title 18 U.S.C. Section 922(h) applies to petitioner who purchased a firearm in an intrastate transaction, and was not involved in any manner with the interstate transportation of said firearm.

STATUTE INVOLVED

Title 18 U.S.C. Section 922(h)

It shall be unlawful for any person----

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, . and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT OF THE CASE

On or about the first day of April, 1972, petitioner Pearl Barrett bought a Smith and Wesson .38 caliber pistol from Larry D. Bates, the owner and operator of the Western Auto Store in Bonneville, Kentucky. Some time after that purchase, Barrett was stopped by the Owsley County, Kentucky Sheriff's Department for driving while under the influence of an alcoholic beverage, and the firearm was discovered on the floor of his car and confiscated.

Subsequent to the arrest for drunk driving, a warrant was issued for petitioner's arrest for a violation of the Gun Control Act, and more specifically, Title 18 U.S.C. Section 922(h). Petitioner had been previously convicted of a felony in January, 1967, and Section 922(h) prohibits a convicted felon from possessing a firearm. Petitioner was then tried and convicted of this offense in the United States District Court for the Eastern District of Kentucky at Jackson on May 24, 1973. Prior to and during the trial, defense counsel moved to quash the indictment on the basis that petitioner had received, on June 20, 1969, by virtue of executive order of the Governor of Kentucky, a Restoration of All Civil Rights lost due to his felony conviction of January, 1967, but the trial court denied these motions.

This judgment was affirmed by the United States Court of Appeals for the Sixth Circuit, after oral argument, on October 18, 1974.

SUMMARY OF ARGUMENT

Petitioner's act of purchasing a weapon in his home town was purely an intrastate transaction. Petitioner, himself, took no direct steps to have the weapon shipped to him, nor did he then travel to another state with said weapon.

The interpretation of 18 U.S.C. Section 922(h) by the courts has been that its principle purpose is to prevent certain classes of persons from buying or selling guns across state lines. It was enacted to regulate gun trafficking. As such, for an offense to be committed under Section 922(h), the offender must have had some

connection with the actual transportation of the weapon in interstate commerce. The mere fact that the weapon itself had previously travelled across state lines is not sufficient to support an offense under Section 922(h), without the showing that the person charged had some direct connection with that transportation.

The legislative history of the statute is clearly in support of the position that some direct connection between the possessor of the weapon and interstate commerce is required. The legislators expressed great concern over gun trafficking, and thus passed this Act to regulate the same. The Act was never intended to apply to one who purchased a firearm in an intrastate sale.

ARGUMENT

I.

THE SCOPE OF TITLE 18 U.S.C. 922(h) DOES NOT EXTEND TO THOSE PERSONS WHO ARE MERELY IN POSSESSION OF A FIREARM, AND WHO HAVE NOT BEEN INVOLVED WITH, OR PARTICIPATED IN, THE INTERSTATE TRANSPORTATION OF THAT FIREARM.

A. Petitioner's acquisition of the firearm here in question was purely an intrastate transaction.

Petitioner acquired the Smith and Wesson .38 caliber pistol, which is the subject matter of this case, in his home town of Booneville, Kentucky. He bought it from the owner and operator of the Western Auto Store, Mr.

Larry D. Bates, himself a resident of Booneville. No other parties were involved; the gun was sold over the counter to Mr. Barrett, and he left the store with it in his possession. (Unlike many other cases involving Section 922, in this transaction the petitioner was never asked to read and sign Federal Form #4473, (R, 45, 46, 47, 67), and so there is not question here of swearing to false information).

The facts, as presented, illustrate a sale of a firearm by a Kentucky merchant, to a Kentucky resident, within the borders of the Commonwealth of Kentucky. On its face, this transaction has no apparent connection with interstate commerce. The petitioner is not a gun dealer, nor is there evidence that he was planning to leave the state with it, or that he planned to commit a felony while using the weapon. On its face, this sale evidences nothing which should bring it within the purview of Section 922(h).

It is only when evidence is presented that the seller had purchased the gun from a distributing house in North Carolina, (R.40), and that the gun had been originally manufactured in Massachusetts, (R. 52), that interstate commerce enters the transaction. But this interstate commerce nexus can only remotely be connected to the petitioner. He was never personally involved in the interstate transportation of the weapon; he did not request that it be shipped from out-of-state; nor did he transport it across any state lines. The original origin of the gun had no significance to him. Evidently he felt he would have no trouble purchasing a gun in his home state. This differs greatly from instances where a resident of one state realizes the difficulties of purchasing a gun in his home state, and

either drives to another state or orders the gun from a mail catalog. In those instances, the state of origin of the weapon is of primary importance, for the weapon will travel across state lines. The buyer is generally aware of the ease with which he can purchase a gun in an out-of-state transaction, and can readily avail himself of the opportunity. In addition, he is usually buying a gun from another state to avoid the legal restrictions in his home state.

None of these circumstances occurred in Booneville, Kentucky. Petitioner went to the local hardware store and bought a pistol. The sale was plainly an intrastate transaction, and, as such, was not prohibited by Title 18 U.S.C. Section 922(h).

B. Title 18 U.S.C. Section 922(h) does not apply to purely intrastate sales or possessions; rather, it deals with interstate transportations and trafficking of firearms and dangerous weapons.

At the outset, it is admitted that Congress has the power to regulate interstate gun trafficking by virtue of the Commerce Clause of the United States Constitution. The question here deals basically with the scope of this legislated coverage, Section 922(h), a statute duly passed by Congress. A broad statement as to the extent of Title IV was made by the Fifth Circuit in *United States v. Lebman*, 464 F.2d 68, 70 (1972):

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate

> commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *M'Culloch v. Maryland*, 4 Wheat. 316, 421, 4 L.Ed. 579 (1819)."

Accepting that Congress may regulate interstate gun sales, the question then becomes twofold: (1) Did petitioner's possession of this firearm "so affect interstate commerce;" and (2) Did Congress intend that possessions which had no immediate, direct connection with an interstate transportation be covered under this statute?

It is difficult to imagine how a single person who purchases a weapon in his home town could affect interstate commerce in any manner other than quite indirectly. Various courts have considered the effect of the violations under Title IV, but few of the decisions have dealt specifically with mere possessions. The Seventh Circuit in the case of *United States v. Hornbeck*, 489 F.2d 1325, 1326 (1973) talked of Congress' power to "impose criminal sanctions for the purpose of regulating purely intrastate activities which substantially affect interstate commerce." And the Ninth Circuit, in *United States v. Petrucci* 486 F.2d 329 (1973) supported this position. But both cases were concerned with 922(a)(1) violations which proscribed dealing in firearms. Both courts justifiably found that the selling of firearms could and did affect interstate commerce.

An important decision from the Sixth Circuit, *United States v. Day*, 476 F.2d 562 (1973), explored in some

depth the rationale of regulating the business of selling guns:

> "In *Perez v. United States*, 402 U.S. 146 (1971), the Supreme Court analyzed anew the scope of Congressional power to regulate purely intrastate activities under the Commerce Clause. As the Court stated: 'The Commerce Clause reaches, in the main, three categories of problems. First the use of channels of interstate or foreign commerce which Congress deems are being misused . . . Second, protection of the instrumentalities of interstate commerce . . . Third, those activities affecting commerce.' 402 U.S. at 150." *Id.* at 566.

The Sixth Circuit had no trouble in finding an interrelation between selling guns, with which defendant Day was charged, and interstate crime and gun trafficking. The effect on interstate commerce was clear, and the possible danger to citizens even more clear if interstate gun sales were to go unregulated. The Commerce Clause unquestionably reached this type of activity.

In response to the first question posed above, it is difficult to foresee the effect on interstate commerce of one man's possession of a firearm in his own state. At the trial, the prosecution presented evidence which showed that the gun had been manufactured in Massachusetts, (R. 52), and that this, in itself, brought the sale in Kentucky within the scope of the statute. If this logic is carried only one step further, an interstate nexus could be established with any finished product, one of the components of which had been produced in another state. It is almost impossible to find a product manufactured in America which does not have an interstate connection, be it with the raw materials,

labor, shipping, etc. The government could always find that nexus if it so desired.

We contend, however, that this obscure "connection" with interstate commerce does not "affect" it so as to come within the reach of Title IV. The mere transferring of money would "affect" interstate commerce in that the money would eventually circulate into the economy and into other states, and if we are to accept that type of reasoning, an intrastate sale would clearly be covered also. But neither of these contentions can be accurate. The cases cited above, and many more not cited here, speak of an *actual* effect on commerce, not an incidental connection thereto. Selling guns, interstate shipping, mail order houses—these are activities which fly in the face of Title IV, and for which it is meant to regulate.

The scope of Title IV, and Section 922 in particular, has been discussed in many forums since its enactment. Most frequently the Courts have interpreted the statute, and almost without exception have held that it is the *business* of selling, shipping, or otherwise trafficking in weapons which is the focal point of regulation under Section 922.

The language of the Fifth Circuit in *United States v. Nelson*, 458 F.2d 556, 559 (1972) is crystal clear in defining the purpose of Section 922:

> "If Congress is to effectively prevent the interstate use of guns for illegal purposes it must control their sources: manufacturers, dealers, and importers. That is what is sought to do in Section 922."

In a later case, *United States v. Lebman*, 464 F.2d 68, 73 (5th Cir., 1972) the Fifth Circuit cited *Nelson* as

its authority for the interpretation of Section 922, and went even further and stated:

> "The principle purpose of H.R. 17735 [Section 922], as amended, is to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the states effectively to regulate firearms traffic within their borders."

The Fourth Circuit concurred in the stated purpose of Title IV in *United States v. Colicchio*, 470 F.2d 977, 979 (1972).

> " 'The purpose of the Gun Control Act of 1968 . . . was . . . to strengthen Federal controls over interstate . . . commerce in firearms and to assist the States effectively to regulate firearms traffic within their borders.' House Report No. 1577 to H.R. 17735 (P.L. 90-618) U.S. Code Cong. and Admin. News, 1968, p. 4411. Congressional purpose was, therefore, to strictly control the illegal transfer of firearms. The interstate sales are part of a pattern which affects the nationwide traffic in firearms."

Although these cases have dealt with those individuals charged with selling or dealing firearms in interstate commerce, the language points out that the business of gun traffic is what the statute pertains to.

The circumstances of petitioner's case do not involve any aspect of gun trafficking. Petitioner's crime was simply that he was found in possession of a firearm, which was later shown to have been shipped to the seller from another state. *United States v. Ruffin*, 490 F.2d 557 (8th Cir., 1974), although it varies somewhat in the facts, also deals with a possession offense under 922(h). The weapon involved had been shipped originally from Connecticut to Texas, and had then

been stolen in Illinois some seven weeks prior to the time it was found in the defendant's possession. The Court was faced with the exact question as presented here: does Section 922(h) extend so far as to prohibit possessions which involve no direct connection with interstate transportation? The Court held unequivocally that it did not:

> "Thus we conclude that it is not sufficient under 922(h) for the government to prove that the firearm had at some remote time previously traveled in interstate commerce . . . Title IV is primarily concerned with the transportation of firearms. Accordingly, for a receipt to be cognizable under 922(h), the government must show that at the time the gun was received it was *part* of an interstate transportation." *Id.* at 560.

Surprisingly, the Sixth Circuit, prior to its opinion in petitioner's case, held exactly as the Eighth Circuit in *Ruffin*. In the decision handed down in *United States v. Craven*, 478 F.2d 1329, 1336 (1973), the Court stated:

> "Therefore, we conclude that 18 U.S.C. Section 922(h) speaks only of receipt of firearms or ammunition in interstate transportations and does not concern possessions at all."

Although the Court ultimately upheld Craven's conviction, it was because the evidence indicated that the defendant had been involved in a second and more recent transportation, and that this met the requirements of 922(h) as to the interstate transportation. But the language quoted above appeared to be clear that a possession alone was not sufficient to uphold a conviction. Yet the Court reversed itself in petitioner's case and stated that once the firearm travelled out of

its state of origin, the ultimate purchaser or possessor had best beware, for the reach of 922(h) would extend to him. There is little explanation for this departure from precedent, and much difficulty in understanding its rationale in light of this Court's language in *United States v. Bass*, 404 U.S. 336, 342 (1971). Justice Marshall, in delivering the opinion for the majority, stated:

> "Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation."

This language of *Bass* was based in part on the prior history of the Gun Control Act of 1968, which was a modified version of 15 U.S.C. Section 902(e) and (f), which in turn had amended the first such statute, 52 Stat. 1250, 1251 (1938). The original statute contained a presumption that mere possession of a firearm was sufficient to justify the finding that it was a product of interstate commerce. That presumption was struck down in *Tot v. United States*, 319 U.S. 463, 466 (1943):

> "The Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate."

As early as 1943 the Court felt that more than merely possessing a gun which had been previously shipped interstate was required to support a Gun Control Act violation. Section 922(h) is part of Title IV of the Omnibus Crime Control and Safe Streets Act of

1968, Public Law Number 90-351, and its legislative history supports the position taken by petitioner throughout his appeals, that being the same as set out in *Ruffin, Bass, Tot,* and *Craven*: the purpose of the Act was to control gun trafficking.

Senate Report #1097, 2 U.S. Code, Congressional and Administrative News, pp. 2112-2248 (1968), is a lengthy explanation and history of the Act, and provides the best source for the purpose and scope of the bill. The purpose of the Act was explained as follows:

> "The existing Federal controls over interstate and foreign commerce in firearms are not sufficient to enable the States to effectively cope with the firearms traffic within their own borders through the exercise of their police power. Only through adequate Federal control over interstate and foreign commerce in firearms, and over all persons engaging in the business of importing, manufacturing, or dealing in firearms, can this problem be dealt with and effective State and local regulation of the firearms traffic be made possible." *Id.* at 2114.

The heart of the Act was to deal with *businesses*, not individuals per se. The legislators were most concerned with those persons who dealt in firearms, since regulation of the source is an easier method to control gun use than regulating the users themselves. The Committee reported five major problem areas with which the Act was to deal: (1) mail order houses; (2) any out-of-state, non-resident sources; (3) imported firearms; (4) the ease with which anyone could become licensed as a dealer in firearms; and (5) the ease with which anyone could acquire a destructive device. *Id.* at

2164-2165. The scope of the coverage was to include: (a) interstate traffic in mail order firearms other than rifles and shotguns; (b) acquisition of firearms by juveniles and minors; (c) out-of-state purchase of concealable firearms; (d) importation of nonsporting and military surplus firearms; (e) highly destructive weapons; (f) licensing of importers, manufacturers, and dealers; (g) recordkeeping provisions; and (h) the transfer of the Federal Firearms Act from Title 15 to Title 18. *Id.* at 2166-68.

The report then analyzed each section within the Act, and for Section 922(h) made this comment:

> "This subsection prohibits any person from receiving, etc., any stolen firearm or ammunition 'moving as,' etc., in interstate or foreign commerce. This prohibition is a modified form of the restriction in 15 U.S.C. 902(h) of the present Federal Firearms Act but the restriction would go to ammunition for destructive devices rather than pistol and revolver ammunition." *Id.* at 2205

It is obvious from these comments that the Act in general, and Section 922(h) specifically were neither one aimed at the possessor. A new subject matter, that being "stolen weapons" was introduced in the analysis of 922(h), but even it cannot apply to petitioner's case. The individual views of the Senators on the committee lends more support to the position urged here by petitioner. Senator Fong stated that Title IV:

> " . . . prohibits the transportation or receipt in interstate commerce of a firearm . . . knowing a felony is to be committed with it." *Id.* at 2243.

Senator Tydings, were he present at petitioner's trial, could have exonerated Mr. Barrett of all criminal

liability under Title IV. Speaking specifically to the issue before this court, Mr. Tydings said:

> "Regarding handguns, Title IV provides only that handguns must be bought in the purchaser's home state . . . Title IV provides the controls on interstate gun traffic which only the federal government can apply." *Id.* at 2247-48

He went on to say that the Act was most concerned with criminals buying guns in other states where gun purchase laws were less strict.

Senator Tydings spoke to the heart of the issue before this Court, and his comments, along with the comments of the Committee in general, provide clear information on the purpose of Title IV. It was not designed to regulate individual possessions; it was enacted to control large-scale gun dealing, and those persons *directly* involved in the business of interstate gun sales. Section 922(h) deals with those persons who directly receive those firearms in an interstate transaction. It is concerned with the person purchasing a gun from a mail order catalog, or the individual who drives across a state line and himself transports the gun back to his home state. But nowhere in the legislative history of the Act, or even in the cases which interpreted it, is there to be found the language and/or the justification for extending the interstate commerce connection to one who purchases a firearm which had been previously transported through no efforts by the purchaser. This extension is not supported by these authorities, and petitioner's conviction must be reversed because the statute clearly does not apply to him.

CONCLUSION

The opinion of the Sixth Circuit Court of Appeals upholding petitioner's conviction under Title 18 U.S.C. Section 922(h) must be reversed for the reason that the statute does not apply to petitioner, who only possessed a firearm, and did not involve himself in the interstate transportation of that weapon.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

PEARL BARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	4
Argument:	
I. Section 922(h) of the Gun Control Act prohibits the intrastate purchase by a convicted felon of a firearm which previously had been transported to the dealer in interstate commerce	7
A. The language of Section 922(h) unambiguously covers the intrastate purchase of a firearm previously shipped or transported interstate	7
B. The structure of the Gun Control Act shows that Congress intended Section 922(h) to prohibit the persons there designated from receiving any firearms that have been transported in interstate commerce	13
C. The legislative history of the Gun Control Act confirms our interpretation of Section 922(h)	18
II. This Court should not follow its statements in *Tot* v. *United States* and	

Argument—Continued Page

United States v. *Bass* that Section 2(f) of the Federal Firearms Act of 1938 and Section 922(h) of the Gun Control Act do not apply to the intrastate receipt of firearms and ammunition that previously have moved in interstate commerce 22

Conclusion 28

Appendix 1a

CITATIONS

Cases:

American Fur Co. v. *United States*, 2 Pet. 348 12-13
Browder v. *United States*, 312 U.S. 335 11
Girouard v. *United States*, 328 U.S. 61 26
Helvering v. *Hallock*, 309 U.S. 106 26
Huddleston v. *United States*, 415 U.S. 814 ..... 13, 16, 17, 20
Rewis v. *United States*, 401 U.S. 808 12
Tot v. *United States*, 319 U.S. 463 ..... 4, 6, 7, 18, 22, 24, 25, 26, 27
United States v. *Bass*, 404 U.S. 336 ..... 6, 12, 13, 23, 25, 27
United States v. *Biswell*, 406 U.S. 311 17
United States v. *Raynor*, 302 U.S. 540 26
United States v. *Sullivan*, 332 U.S. 689 11
United States v. *Wiltberger*, 5 Wheat. 76 11
Yates v. *United States*, 354 U.S. 298 11
Zuber v. *Allen*, 396 U.S. 168 28

Statutes and regulations: Page

Federal Firearms Act of 1938, 52 Stat. 1250, as amended:

Section 2(e) 15
Section 2(f) 4, 7, 18, 19, 22, 25

Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040, as amended, 21 U.S.C. 301 *et seq.*:

Section 201(v), 21 U.S.C. (1964 ed., Supp. I) 321 8
Section 301(k), 21 U.S.C. 331 11

Gun Control Act of 1968, 82 Stat. 1213, 18 U.S.C. 921 *et seq.*:

Section 922 ..... 1a
Section 922(a)(1) 14, 16, 1a
Section 922(a)(2) 14, 1a
Section 922(a)(3) 9, 14, 2a-3a
Section 922(a)(6) 17, 4a
Section 922(b)(1) 13, 4a
Section 922(b)(2) 17, 5a
Section 922(b)(5) 17, 6a
Section 922(c) 17, 7a
Section 922(d) 5, 13, 15, 16, 9a
Section 922(f) 10, 10a
Section 922(g) 6, 13, 15, 16, 10a
Section 922(h) ..... *passim*
Section 922(h)(1) 9, 11a
Section 922(h)(4) 9, 11a
Section 922(k) 10, 12a
Section 923(a) 16
Section 923(d)(1)(A) 13
Section 923(d)(1)(B) 16
Section 925(c) 12a

Statutes and regulations—Continued — Page

Internal Revenue Code of 1954, 26 U.S.C. (1964 ed.) 4731(a) — 8
Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 921 *et seq.* — 15, 18
15 U.S.C. 77e — 10
18 U.S.C. 2 — 15
18 U.S.C. 2(b) — 15
18 U.S.C. 659 — 10
18 U.S.C. 841-848 — 14
18 U.S.C. 1084 — 10
18 U.S.C. 1201 — 10
18 U.S.C. 1231 — 10
18 U.S.C. 1951 — 10
18 U.S.C. 1952 — 10
18 U.S.C. 2313 — 10
18 U.S.C. 2315 — 10
18 U.S.C. 2421 — 10
18 U.S.C. 4208(a)(2) — 3
18 U.S.C. App. 1201 — 13a
18 U.S.C. App. 1202(a) — 15, 23, 24, 14a
18 U.S.C. App. 1203 — 14a
18 U.S.C. 4208(a)(2) — 3
26 C.F.R. 178.124 — 17

Miscellaneous:

114 Cong. Rec. 12303-12304 — 26
114 Cong. Rec. 13219 (1968) — 20
114 Cong. Rec. 21784 (1968) — 21
Hearings on S. Res. 74 before a Subcommittee of the Senate Committee on Commerce, 73d Cong., 2d Sess. (1934) — 19

Miscellaneous—Continued — Page

Hearings on S. 885, S. 2258, S. 3680, before a Subcommittee of the S. Committee on Commerce, 73d Cong., 2d Sess. (1934) — 19-20
Hearings on S. 3 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937) — 19
Hearings on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386, before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess. (1967) — 20, 21
S. Rep. No. 1189, 75th Cong., 1st Sess. (1937) — 19
S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) — 21, 26
S. Rep. No. 1501, 90th Cong., 2d Sess. (1968) — 20, 26
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OPINION BELOW

The opinion of the court of appeals (App. 16-27) is reported at 504 F.2d 629.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1974. The petition for a writ of certiorari was filed on November 18, 1974, and was granted on February 18, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 18 U.S.C. 922(h), which makes it unlawful for a convicted felon, among others, to receive a firearm "which has been shipped or transported" in interstate commerce, covers the intrastate purchase by a convicted felon of a firearm which previously had been transported to the dealer in interstate commerce.

STATUTES INVOLVED

18 U.S.C. 922(h) provides:

> (h) It shall be unlawful for any person—
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201 (v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
>
> (4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

The other pertinent statutes are set forth in the Appendix to this brief, *infra*, pp. 1a-15a.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of receiving, after having been convicted of a felony, a firearm that had been transported in interstate commerce, in violation of 18 U.S.C. 922(h) (App. 5). He was sentenced to three years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2) (App. 9-10). The court of appeals affirmed, one judge dissenting (App. 16-27; 504 F.2d 629).

On April 1, 1972, petitioner, a resident of Booneville, Kentucky, who previously had been convicted of the crime of housebreaking and sentenced to two years' imprisonment for that offense (Tr. 78-79), purchased a .32 caliber Smith & Wesson revolver from a federally-licensed firearm dealer in Booneville (Tr. 37, 40-41, 77). The revolver had been manufactured in Massachusetts and received by the Kentucky dealer from a North Carolina distributor about a month before petitioner purchased it. The sale to petitioner was the first retail sale of the firearm (Tr. 39-40, 42, 52). About 45 minutes after he purchased the firearm, petitioner was arrested for driving while intoxicated. The police thereupon found the fully-loaded firearm on the floorboard of the car on the driver's side (Tr. 19-21, 78).

At trial, no evidence was adduced to show that petitioner had in any way participated in the inter-

state shipment of the firearm. The trial court rejected petitioner's contention that such proof was an essential element of the crime under 18 U.S.C. 922 (h), and instructed the jury that the interstate commerce requirement would be satisfied if the firearm had at some time in the past traveled in interstate commerce (Tr. 99).

The court of appeals affirmed, holding that petitioner's receipt of the revolver violated the plain language of Section 922(h) and that it was not necessary for the government to prove that petitioner received the firearm from a common carrier in interstate commerce (App. 17-19). Judge McCree dissented, on the ground that this Court in *Tot* v. *United States*, 319 U.S. 463, had authoritatively construed Section 2(f) of the Federal Firearms Act, the predecessor of Section 922(h), to require that the direct interstate receipt of a firearm be shown (App. 24-27).

SUMMARY OF ARGUMENT

I

A. The language of Section 922(h) of the Gun Control Act of 1968, making it unlawful for a convicted felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," unambiguously covers the intrastate purchase of a firearm previously shipped or transported interstate. The language pertains solely

to what was done to the firearm or ammunition prior to receipt—that it was shipped or transported interstate—and does not require any participation by the convicted felon in that shipment or transport. Congress was fully aware of the normal meaning given to such language. It used the same present perfect tense to describe two of the categories of persons who are prohibited in the same statute from acquiring a firearm or ammunition because of past events. Moreover, had it wished to confine the provision to the direct interstate receipt of a firearm or ammunition it would have used the language it employed elsewhere in the Act to describe the receipt of a firearm "which is moving as, which is a part of, or which constitutes" interstate commerce, or to make it illegal "to * * * receive in interstate * * * commerce" a firearm.

Since the prohibition in Section 922(h) is clear, petitioner received fair warning of the sanctions the law placed on his conduct, and there is no ambiguity necessitating resolution in favor of lenity.

B. The structure of the Gun Control Act confirms the plain meaning of Section 922(h), since virtually every section of the Act is designed to keep firearms and ammunition out of the hands of certain categories of potentially irresponsible people, including convicted felons, whose possession of them would create a serious danger of public injury.

So construed, Section 922(h) complements Section 922(d), which prohibits licensees from knowingly selling or otherwise disposing of firearms in an inter-

state or intrastate transaction to the same categories of potentially irresponsible people. Were Section 922 (h) limited to direct interstate receipts, those persons could obtain a firearm whenever a licensee inadvertently sold it to them in an intrastate transaction. Petitioner's reading of Section 922(h) would also relegate it to a near redundancy with Section 922(g), which prohibits the same categories of persons from shipping firearms interstate or causing them to be shipped interstate.

Section 922(h), construed to cover intrastate receipts of firearms previously shipped or transported interstate, is also congruent with the Act's strict licensing and record-keeping requirements, and the prohibition upon the giving of false material information to licensees. Congress did not except from the direct prohibitions of the Act that which it sought to prevent indirectly in the remainder of the Act through a complex set of prophylactic measures governing intrastate sales and dispositions of firearms and ammunition.

C. The legislative history of the Gun Control Act shows a broad purpose to keep firearms out of the hands of certain categories of potentially irresponsible people. There is no indication in either the committee reports or the congressional debates that the scope of the statute was to be in any way restricted.

II

This Court should not follow its statements in *Tot* v. *United States* and *United States* v. *Bass* that Sec-

tion 2(f) of the Federal Firearms Act of 1938 and Section 922(h) of the Gun Control Act do not apply to the intrastate receipt of a firearm that previously had moved in interstate commerce, since those statements do not rest upon any analysis of the language, statutory design, or legislative history of the provision. Congress cannot be deemed to have approved or adopted the interpretation of Section 922(h) in *Tot* when, a quarter of a century later, it used the identical language in enacting a new gun control law which reflected an intention broadly to bar the receipt of firearms and ammunition by certain categories of potentially irresponsible persons.

ARGUMENT

I.

SECTION 922(h) OF THE GUN CONTROL ACT PROHIBITS THE INTRASTATE PURCHASE BY A CONVICTED FELON OF A FIREARM WHICH PREVIOUSLY HAD BEEN TRANSPORTED TO THE DEALER IN INTERSTATE COMMERCE

A. The language of Section 922(h) unambiguously covers the intrastate purchase of a firearm previously shipped or transported interstate.

1. Section 922(h) of the Gun Control Act makes it unlawful for a convicted felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."[1] As the

[1] The prohibition applies to four categories of persons: (1) one who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a

court of appeals concluded, "there is no ambiguity in Section 922(h) of the Act. It means exactly what it says" (App. 19). It bars receipt of any firearm that "has been" shipped or transported in interstate commerce without regard to whether the receipt itself was part of the interstate movement.

The meaning is clear: a convicted felon is prohibited from receiving any firearm or ammunition which at some past time has been shipped or transported in interstate commerce. There are no qualifying words which would limit the prohibition to situations where the convicted felon was himself the consignor or consignee of the interstate shipment, or where in some other way he directly received the interstate shipment. The language pertains solely to what was done to the firearm or ammunition before the receipt (its shipment or transportation in interstate commerce) and makes no reference to any participation by the convicted felon in that shipment or transport.

Use of the "present perfect" tense, as in "*has been* shipped or transported" unambiguously denotes an "act or state completed at the time of speaking" (Webster's *New International Dictionary* (2d ed. unabridged, 1936). The statute covers receipt of a firearm which has already completed its interstate journey and has come to rest within the state at the time of its purchase. Congress was fully aware of the normal meaning of the present perfect tense, since it also used that tense to describe two of the categories of persons who are prohibited in the same statute from acquiring such a firearm or ammunition because of past events: a person who "*has been* convicted" of a crime punishable by imprisonment for a term exceeding one year (Section 922(h)(1)), and a person who "*has been* adjudicated as a mental defective" or "*has been* committed to any mental institution" (Section 922(h)(4)) (emphasis supplied).

By contrast, the prohibited act—"*to receive* any firearm or ammunition"—is stated in the present tense, showing that it relates to an act done after the firearm or ammunition has completed its interstate movement.

2. Had Congress wished to confine Section 922(h) to the direct interstate receipt of a firearm or ammunition, as petitioner maintains, Congress would have said so, as it did in other sections of the Gun Control Act. In Section 922(a)(3), for example, which prohibits any non-licensee from receiving any firearm he previously purchased or obtained outside his state of residence,[14] Congress barred a non-licensee from receiving any firearm "purchased or otherwise obtained *by such person* outside that State * * *"

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term exceeding one year—a category that would include convicted felons; (2) one who is a fugitive from justice; (3) one who is an unlawful user of or addicted to marijuana or any depressant or stimulant drug (as defined in Section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (defined in Section 4731(a) of the Internal Revenue Code of 1954); or (4) one who has been adjudicated as a mental defective or who has been committed to any mental institution.

[14] The Act requires manufacturers of and dealers in firearms and ammunition to be licensed by the Secretary of the Treasury. See p. 16, *infra*.

(emphasis supplied). By contrast, Section 922(h) contains no language even suggesting that its prohibition of receipt by a convicted felon (among others) applies only when the firearm or ammunition was transported or received in interstate commerce by such person.

Similarly, Section 922(j) prohibits the receipt of a stolen firearm "which is moving as, which is a part of, or which constitutes" interstate commerce. Had Congress intended to impose a similar limitation in Section 922(h), it could have used that language or another similar common phrase for limiting a statute to direct interstate receipt.[2] Alternatively, Congress could have used language such as that in Section 922(k), which makes it unlawful for any person knowingly "to * * * receive in interstate * * * commerce"[3] any firearm whose serial number has been removed or altered.

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[2] See, *e.g.*, 18 U.S.C. 659 ("[W]hoever * * * by fraud or deception obtains * * * any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight * * *"); 18 U.S.C. 2313 ("[w]hoever receives * * * any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen * * *"); 18 U.S.C. 2315 ("[w]hoever receives * * * any goods, wares, or merchandise * * * moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen * * *").

[3] Many other federal statutes—in contrast to Section 922(h)—also prohibit the doing of certain acts "in interstate or foreign commerce." See, *e.g.*, 18 U.S.C. 2421 (transporting a woman for the purpose of prostitution); 18 U.S.C. 1952 (traveling with intent to further or facilitate certain unlawful enterprises); 18 U.S.C. 1951 (committing robbery or extortion); 18 U.S.C. 1231 (transporting persons for the purpose of strikebreaking); 18 U.S.C. 1201 (kidnapping); 18 U.S.C. 1084 (gambling); 15 U.S.C. 77e (securities fraud).

Indeed, it is difficult to see how Congress could have expressed more clearly its intention to prohibit convicted felons (among others) from receiving any firearm or ammunition which some time previously had entered the state where they receive it. "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." *United States* v. *Wiltberger*, 5 Wheat. 76, 95-96; *Yates* v. *United States*, 354 U.S. 298, 305; *Browder* v. *United States*, 312 U.S. 335, 338.

3. *United States* v. *Sullivan*, 332 U.S. 689, strongly supports our reading of Section 922(h). There respondent had been charged with violating Section 301(k) of the Federal Food, Drug and Cosmetic Act of 1938, which prohibits "the doing of any * * * act with respect to, a * * * drug * * * if such act is done *while such article is held for sale after shipment in interstate commerce* and results in such article being misbranded" (emphasis supplied). Respondent contended that the provision did not apply to him, since he had purchased the drugs in question six months after the interstate shipment had been completed by their delivery to another consignee (332 U.S. at 696). This Court held the prohibition covered respondent's conduct. "[T]he language used by Congress broadly and unqualifiedly prohibits misbranding articles held for sale after shipment in interstate

commerce, without regard to * * * how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment" (*ibid.*).

The same reasoning applies to the language in Section 922(h), which broadly and unqualifiedly prohibits petitioner, a convicted felon, from receiving a firearm which has been transported in interstate commerce, without regard to intervening intrastate sales or who had received the firearm at the end of the shipment. Indeed, the operative language of Section 922(h) was originally enacted as part of the Federal Firearms Act by the same Congress that enacted the Federal Food, Drug and Cosmetic Act, and with a similar purpose: to protect the public from negligent or irresponsible handling of an inherently dangerous product traveling in interstate commerce, up to and including the time when it is purchased or received in an intrastate transaction.[4]

4. Since the prohibition in Section 922(h) is unambiguous, petitioner received fair warning of the sanctions the law placed on his conduct. Petitioner was on notice that his purchase of a firearm which previously had been shipped or transported into the state was unlawful. Thus this is not an occasion for application of the maxim that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812; *United States* v. *Bass*, 404 U.S. 336, 347. Although penal laws are to be strictly construed, they

[4] See our discussion of the Legislative history of the Federal Firearms Act, *infra*, at 18-19.

"ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Company* v. *United States*, 2 Pet. 348, 367; *United States* v. *Bass*, *supra*, 404 U.S. at 351; *Huddleston* v. *United States*, 415 U.S. 814, 831.

B. The structure of the Gun Control Act shows that Congress intended Section 922(h) to prohibit the persons there designated from receiving any firearms that have been transported in interstate commerce.

The structure of the Gun Control Act confirms that Congress meant what it said when in Section 922(h) it unequivocally prohibited convicted felons (among others) from receiving any firearm which has been shipped or transported in interstate commerce.

Virtually every section of the Act manifests a single goal: to keep firearms and ammunition out of the hands of certain categories of people whose possession of them would create a serious danger of public injury. Those potentially irresponsible individuals—persons under indictment, convicted felons, fugitives, those addicted to or unlawfully using narcotics, adjudicated mental defectives or those committed to a mental institution[5]—are comprehensively barred by the Act from acquiring firearms or am-

[5] Sections 922(d), (g) and (h). See n. 1, *supra*. Licensees are also prohibited from selling or delivering any firearm or ammunition to a person who the licensee has reasonable cause to believe is under 18 years of age (Section 922(b)(1). A person under 21 years of age cannot receive a license to deal in firearms (Section 923(d)(1)(A)).

munition by any means.[6] Construing Section 922(h) to cover intrastate receipts of firearms and ammunition that have moved interstate is in accord with and furthers this comprehensive regulatory scheme.

1. Section 922(d) prohibits licensees from knowingly selling or otherwise disposing of firearms, in an interstate or intrastate transaction, to the same categories of potentially irresponsible persons.[7] Our interpretation of Section 922(h) complements Section 922(d) by barring these potentially irresponsible persons from receiving any firearm or ammunition previously transported interstate, even if an unwitting or negligent licensee is otherwise willing to sell it to them. In the instant case, for example, the dealer who sold petitioner the fire-arm testified that at the time of the sale it had not occurred to him to ask petitioner if he was a convicted felon, since the dealer had known petitioner for five years during which time petitioner frequently purchased sporting goods at the dealer's store (Tr. 46, 47).

Under petitioner's construction of Section 922(h), however, such inadvertence would give those potentially irresponsible persons an unrestrained opportunity to obtain all the firearms and ammunition

[6] These same persons were comprehensively barred by Congress from acquiring explosive materials. See 18 U.S.C. 841-848.

[7] Non-licensees are prohibited from engaging in the business of transporting or shipping firearms or ammunition in interstate commerce. Section 922(a)(1), (2), and (3).

they desire.[8] Petitioner's reading of Section 922(h) also would create the anomaly that, although licensees are prohibited by Section 922(d) from knowingly selling firearms or ammunition in an interstate *or* intrastate transaction, the persons to whom the licensees cannot sell would be prohibited from receiving such goods only if the transaction were interstate. They could avoid liability altogether by the simple expedient of purchasing firearms or ammunition from their local dealer.

2. Our interpretation of Section 922(h) also comports with Section 922(g), which prohibits the same categories of potentially irresponsible persons from shipping firearms interstate or causing them to be shipped interstate.[9] Petitioner's reading of Section 922(h), however, would relegate it to a near redundancy with Section 922(g), since almost every inter-

[8] While convicted felons would be prohibited by 18 U.S.C. App. 1202(a) from receiving a firearm intrastate (see our discussion of Title VII of the Omnibus Crime Control and Safe Streets Act, *infra*, at 23-24), Section 1202(a) does not prohibit such persons from obtaining ammunition. Nor does it prohibit indictees, fugitives, or persons who are addicted to or unlawfully use narcotics from receiving a firearm or ammunition.

[9] Section 922(g) was derived from Section 2(e) of the Federal Firearms Act of 1938, which made it unlawful for certain persons to ship or transport or to "cause [a firearm or ammunition] to be shipped or transported" in interstate commerce. The latter clause became unnecessary with the enactment of 18 U.S.C. 2(b), making one who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States" punishable as a principal. See Reviser's Note to 18 U.S.C. 2.

state shipment is likely to have been solicited or otherwise caused by the direct recipient. Thus Section 922(h) would cover the identical acts covered by Section 922(g), except on the rare occasion where the interstate shipment so received had not been solicited by the recipient.

Petitioner's construction would create a further anomaly. If a prohibited person attempts to purchase from his local dealer a firearm that is not currently in the dealer's stock, causing the dealer to order it interstate, that person violates Section 922 (g), since he caused the interstate shipment to occur. Under petitioner's construction of Section 922(h), however, the person would escape liability altogether if the firearm had already completed its interstate travel and happened to be in the dealer's stock at the time of purchase.

3. The government's construction of Section 922 (h) is also congruent with other provisions of the Act which regulate intrastate sales. Under the Act, a manufacturer of or dealer in firearms or ammunition must be licensed by the Secretary of the Treasury (Sections 922(a)(1), 923(a)), even if his business is transacted entirely within his own state. No person barred from receiving firearms or ammunition may obtain a license (Section 923(d)(1)(B)). Licensees may not knowingly sell or otherwise dispose of firearms or ammunition to such persons, even if the sale or disposition is wholly intrastate (Section 922 (d)). See *Huddleston* v. *United States*, 415 U.S. 814, 833. The statute further provides that recipients must

physically be present on the licensee's premises at the time of purchase (unless certain strict requirements are met) (Section 922(c)), and it forbids recipients from knowingly giving licensees false information as to facts material to the lawfulness of the sale (Section 922(a)(6)). Both of these provisions also cover wholly intrastate transactions. See *Huddleston* v. *United States*, *supra*, 415 U.S. at 833.

Further provisions forbid disposition of firearms to anyone who is prohibited from possessing or purchasing a weapon by state or local law at the place of sale or delivery (Section 922(b)(2)). The Act also requires that a licensee note the names, ages and places of residence of all persons to whom firearms are sold or otherwise disposed (Section 922(b)(5)). Additionally, the licensee is required to maintain such records in the form required by the Secretary of the Treasury, filing such reports as the regulations prescribe (see 26 C.F.R. 178.124). The licensee's place of business is subject to inspection for the purpose of inspecting records and firearms sold on the premises. Cf. *United States* v. *Biswell*, 406 U.S. 311, 315-316.

Were Section 922(h) confined to the direct interstate receipt of firearms or ammunition, as petitioner urges, the Gun Control Act would cover every aspect of intrastate transactions in firearms or ammunition except the most crucial aspect: actual receipt. Congress did not except from the direct prohibitions of the Act that which it sought to prevent indirectly in the remainder of the Act through a complex set

of prophylactic measures governing intrastate sales and dispositions.

C. The legislative history of the Gun Control Act confirms our interpretation of Section 922(h).

1. The Gun Control Act (Pub. L. 90-618) was enacted in 1968 as an amended (and identical, but for a provision extending coverage to long guns) version of Title IV of the Omnibus Crime Control and Safe Streets Act (Pub. L. 90-351), enacted earlier that year. Both acts enlarged and extended the Federal Firearms Act of 1938 (c. 850, 52 Stat. 1250). While the operative phrase of Section 922(h) of the Gun Control Act, making it illegal to receive "any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," remained identical to that in Section 2(f) of the Federal Firearms Act,[10] Section 922(h) expanded the categories of persons prohibited from such receipt.[11]

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[10] Section 2(f) provided:

> It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.

The presumption of receipt from the fact of possession was held to violate due process in *Tot* v. *United States,* 319 U.S. 463, discussed *infra,* pp. 22-28.

The Gun Control Act also added many of the other prophylactic measures, governing intrastate as well as interstate transactions, to which we have already referred (*supra,* pp. 16-17).[12]

The Federal Firearms Act had a broad purpose: "to prevent the crook and gangster, racketeer and fugitive from justice from being able to *purchase or in any way come in contact* with firearms of any kind * * *" (S. Rep. No. 1189, 75th Cong., 1st Sess., p. 33 (1937); emphasis supplied). None of the committee reports or hearings on that legislation reflects any intention to confine Section 2(f) to direct interstate receipts of firearms.[13]

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[11] See n. 1, *supra,* p. 7. Section 922(h) also substituted persons "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" for the Section 2(f) category of persons "convicted of a crime of violence."

[12] The new features in the Gun Control Act included a ban on interstate shipments to or from non-licensees, and a provision making it unlawful for non-licensees to engage in manufacturing or dealing in firearms, whether or not such business involved interstate commerce. The Act also increased the fees for licenses, set minimum standards for licensees, gave the Secretary of the Treasury broad regulatory powers, and required that dealers obtain identification from would-be purchasers. See our discussion, *supra,* pp. 16-17. See generally Zimring, *Firearms and Federal Law: The Gun Control Act of 1968,* 4 J. Legal Studies 133 (1975).

[13] See S. Rep. No. 1189, 75th Cong., 1st Sess. (1937); also Hearings on S. 3 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937); Hearings on S. Res. 74 before a Subcommittee of the Senate Committee on Commerce, 73d Cong., 2d Sess. (1934); Hearings on S. 885, S. 2258, S. 3680, before a Sub-

The history of the 1968 Gun Control Act indicated a similar concern with keeping firearms and ammunition out of the hands of certain categories of potentially irresponsible persons, including convicted felons. The principal purpose of the 1968 Act was also stated broadly: to curb crime by keeping "firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., p. 22 (1968). See also 114 Cong. Rec. 13219 (1968) (remarks by Senator Tydings); *Huddleston* v. *United States*, *supra*, 415 U.S. at 824.

Congress in 1968 was aware of the continuing hazard posed by firearms and ammunition in the hands of certain persons, regardless of how those persons obtained them. During 1967, extensive hearings had been held on various anti-crime bills, including proposed gun control legislation, during which frequent reference was made to the report of the President's Commission on Law Enforcement and the Administration of Justice, published in February 1967, as *The Challenge of Crime in a Free Society.*[14]

committee of the Senate Committee on Commerce, 73d Cong., 2d Sess. (1934).

[14] See Hearings on H.R. 5037, H.R. 5038, H.R. 5384, H.R. 5385 and H.R. 5386, before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., pp., 213, 242, 261 (1967) (testimony and statement of former Attorney General Ramsey Clark); pp. 487-488 (table submitted by Congressman Casey showing percentage of serious crimes committed with firearms); p. 495 (testimony of James V. Bennett, President, National Council for a Responsible Firearms

A chapter of the report dealt with more effective gun control legislation, noting that the existing Federal Firearms Act of 1938 had not been effective in preventing convicted felons from purchasing firearms locally after they had been transported from another state (*id.* at 240). The seriousness of the possession of firearms by such persons was underscored by statistics showing that in 1965, 5,600 murders, 34,700 aggragated assaults, and the vast majority of 68,400 armed robberies were committed by means of firearms, and that all but 10 of the 278 law enforcement officers murdered from 1960 through 1965 were killed with firearms (*id.* at 239).

The Gun Control Act sought, in the words of Congressman Celler, its House Manager, "to maximize the possibility of keeping firearms out of the hands of [potentially irresponsible] persons." 114 Cong. Rec. 21784 (1968). In light of this purpose, Con-

Policy). The Crime Commission's report was also considered by the Senate Judiciary Committee in connection with S. 917, the bill which was substituted for H.R. 5037 and was eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968. S. Rep. No. 1097, 90th Cong., 2d Sess. p. 31 (1968).

The committee report on S. 917 cited, in a discussion of Title IV of the bill (including the provision that was to become Section 922(h) of the Gun Control Act), further statistics on the use of firearms in the commission of serious crimes, indicating significant increases in 1966 and 1967 over the 1965 figures reflected in the Crime Commission's report. *Id.* at 76. Further statistics and reports on firearms were cited in the addiitonal views of Senator Tydings on Title IV, which accompanied the commiteee report. *Id.* at 190, 193-195, 203-204.

gress could not have intended that the broad and unambiguous language of Section 922(h)—prohibiting such persons from receiving "any firearm or ammunition which has been shipped or transported in interstate * * * commerce"—be confined to direct interstate receipts, as petitioner suggests.

Under petitioner's reading, Section 922(h) would not cover the most common transaction in firearms or ammunition: their purchase or receipt from a local dealer. It would be confined to the relatively unusual situation where the firearms or ammunition were shipped interstate directly to the prohibited recipient. But given the purpose of Congress in 1968 to strengthen the gun control law, it is improbable that the broad language of the provision was intended to be confined to such an unusual situation.

II.

THIS COURT SHOULD NOT FOLLOW ITS STATEMENTS IN *TOT* v. *UNITED STATES* AND *UNITED STATES* v. *BASS* THAT SECTION 2(f) OF THE FEDERAL FIREARMS ACT OF 1938 AND SECTION 922(h) OF THE GUN CONTROL ACT DO NOT APPLY TO THE INTRASTATE RECEIPT OF FIREARMS AND AMMUNITION THAT PREVIOUSLY HAVE MOVED IN INTERSTATE COMMERCE

In *Tot* v. *United States*, 319 U.S. 463, this Court held invalid, as violating due process, the presumption in Section 2(f) of the Federal Firearms Act of 1938 that the possession of a firearm or ammunition by a person convicted of a crime of violence would

justify the jury in inferring that the firearm or ammunition had been shipped in interstate commerce and had been received after the effective date of the Act. Prior to so ruling, however, it stated with respect to the language of the statute defining the crime—"receiv[ing] any firearm or ammunition which has been shipped in interstate or foreign commerce"—(319 U.S. at 466):

> Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct.

The Court also twice referred in passing to the acquisition of firearms or ammunition in interstate commerce (pp. 469, 472).

When Congress enacted Title IV of the Omnibus Crime Control and Safe Streets Act (of which the gun control law, including Section 922(h), is a part), it also enacted Title VII of that Act. One provision of that title, 18 U.S.C. App. 1202(a), prohibits convicted felons (among others) from "receiv[ing], possess[ing], or transport[ing] *in commerce or affecting commerce* * * * any firearm" (emphasis supplied).

United States v. *Bass*, 404 U.S. 336, held that the words "in commerce or affecting commerce" in Title VII apply to "receiv[ing]" and "possess[ing]" and not just to "transport[ing]," as the government con-

tended; and accordingly that the government is required to prove a "nexus with interstate commerce * * * in individual cases" (p. 350). The Court then ruled, however, that to establish the offense under Section 1202(a) of " 'receiv[ing] * * * in commerce or affecting commerce' * * * the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce" (*ibid.*; footnote omitted). In rejecting the government's contention that reading the statute as requiring an interstate nexus for the offense of receiving "would make Title VII redundant with Title IV" (p. 341), the Court stated (p. 342) that Title VII "punish[es] a broader class of behavior" than Title IV:

> Even under respondent's view, a Title VII offense is made out if the firearm was possessed or received "in commerce or affecting commerce"; however, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation.[10] [pp. 342-343.]

In footnote 10 the Court stated (p. 343) that, in striking down the presumption of the predecessor statute in *Tot*, it "there noted":

> "[T]he Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate." *Id.*, at 466.[15] While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that the 1968 Act changed the prior approach to the "receipt" offense. See, *e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess., 115 (1968).

The statements in *Tot* and *Bass* that Section 2(f) of the 1938 Act and Section 922(h) of the Gun Control Act do not apply to the intrastate receipt of a firearm or ammunition that previously has moved interstate, do not rest upon any analysis of the language, the legislative history or the basic statutory design. Although the government's brief in *Tot* argued for several pages that Section 2(f) applied only to receipts that were part of interstate transactions (Brief for the United States, No. 569, October Term, 1942, pp. 11-17), the Court apparently treated the proposition as accepted for the purposes of the case, and without any substantial discussion of the point went on to consider at length the validity of the presumption.

Although when Congress considered the Gun Control Act more than twenty years later, it presumably was aware of the *Tot* holding that the presumption was invalid, since it did not include the presumption in the new statute, there is no indication that it was aware of the statement in *Tot* that the words "receive any firearm or ammunition which has been

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[15] This statement is broader than the language in *Tot*, where the quoted language was preceded by the words "[b]oth courts below held that the offense created by * * *" (319 U.S. at 466).

shipped or transported in interstate or foreign commerce" do not mean what they say and are limited to receipts that are a part of such commerce. We have found no reference to *Tot* in any of the reports or debates on the Gun Control Act (see S. Rep. Nos. 1501 and 1097, 90th Cong., 2d Sess. (1968); 114 Cong. Rec. 12303-12304 (1968)), and there is nothing in that legislative history showing any intent to accept the limited interpretation given that phrase in *Tot*.

Thus, Congress cannot be deemed to have approved or adopted the interpretation of those words in *Tot* when, a quarter of a century later, it used the identical language in enacting a new gun control law. "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision * * *." *Helvering* v. *Hallock*, 309 U.S. 106, 119-120 (footnote omitted); cf. *United States* v. *Raynor*, 302 U.S. 540, 551-552; *Girouard* v. *United States*, 328 U.S. 61, 69-70. To the contrary, as we have shown in point I, the entire design of the statute reflects an intention broadly to bar the receipt of firearms and ammunition by the categories of potentially irresponsible persons whom Congress prohibited from acquiring those articles.

The Court's statements in *Bass* about the apparently limited reach of Section 922(h) suffer from the same infirmity. They were apparently based upon the Court's earlier indication in *Tot* that the predecessor statute was thus restricted. The briefs in *Bass* did not discuss the scope of Section 922(h). The Court's interpretation of that section was designed to show that there were significant differences in the reach of that section and the section involved in *Bass*. They were made without any discussion of the factors normally considered in interpreting legislation: the language, legislative history and design and purpose of the statute. Indeed, the single authority cited in addition to *Tot* on this issue—the Senate Conference Report on the Gun Control Act (404 U.S. at 343, n. 10)—supports rather than undercuts our interpretation of Section 922(h). See, *supra*, p. 20.

The Court's interpretation of Titles IV and VII in *Bass* leads to this anomaly: Title VII, which covers "receiv[ing] * * * in commerce or affecting commerce * * * any firearm," requires only a showing that the firearm received has previously traveled in interstate commerce" (404 U.S. at 350); but Title IV, which covers "receiv[ing]" any firearm * * * which has been shipped or transported in interstate * * * commerce," is limited to "receiving of firearms as part of an interstate transportation" (p. 343). There is no reason to believe that Congress intended to produce this topsy-turvy result when it enacted these related provisions as different titles of the same Act.

In these circumstances, we urge that this Court should not consider itself bound by the statements in *Tot* and *Bass* regarding the limited reach of the pro-

vision. Instead, it should reexamine the question afresh on the basis of the arguments made in point I. Those arguments convincingly show that the language in Section 922(h) covers the intrastate receipt of a firearm or ammunition that previously had moved in interstate commerce. "This Court has many times reconsidered statutory constructions that have been passively abided by Congress" (*Zuber* v. *Allen*, 396 U.S. 168, 185, n. 21). It should follow the same course here and reject its previous views regarding the limited reach of the statutory prohibition upon a convicted felon receiving "any firearm * * * which has been shipped or transported in interstate or foreign commerce."

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIX

18 U.S.C. 922 provides:

Unlawful acts

(a) It shall be unlawful—

(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm or ammunition to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that—

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufactur-

er, or licensed dealer for the sole purpose of repair or customizing;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his

State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or recepit of a rifle or shotgun obtained in conformity with the provisions of subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe resides in any State other than that in which the transferor resides (or other than that in which its place of business is located if the transferor is a corporation or other business entity); except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm

made to carry out a bequest of a firearm to, or any acquisition by interstate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes; and

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm or ammunition to any person in any State where the purchase or possession by such person of such firearm or ammunition would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of a rifle or shotgun to a resident of a State contiguous to the State in which the licensee's place of business is located if the purchaser's State of residence permits such sale or delivery by law, the sale fully complies with the legal conditions of sale in both such contiguous States, and the purchaser and the licensee have, prior to the sale, or delivery for sale, of the rifle or shotgun, complied with all of the requirements of section 922(c) applicable to intrastate transactions other than at the licensee's business premises, (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes, and (C) shall not preclude any

person who is participating in any organized rifle or shotgun match or contest, or is engaged in hunting, in a State other than his State of residence and whose rifle or shotgun has been lost or stolen or has become inoperative in such other State, from purchasing a rifle or shotgun in such other State from a licensed dealer if such person presents to such dealer a sworn statement (i) that his riflle or shotgun was lost or stolen or became inoperative while participating in such a match or contest, or while engaged in hunting, in such other State, and (ii) identifying the chief law enforcement officer of the locality in which such person resides, to whom such licensed dealer shall forward such statement by registered mail;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1954), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

(5) any firearm or ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if—

(1) the transferee submits to the transferor a sworn statement in the following form:

> "Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement

officer of the locality to which the firearm will be delivered are ————————

————————————————————

Signature ———————— Date ——."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt request evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the shipment.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731 (a) of the Internal Revenue Code of 1954); or

(4) has been adjudicated as a mental defective or has been committed to any mental institution.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation

or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

(f) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(g) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201

(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

to ship or transport any firearm or ammunition in interstate or foreign commerce.

(h) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201 (v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, or which constitutes, interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered.

(*l*) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

18 U.S.C. 925(c) provides, in pertinent part:

> A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. * * *

18 U.S.C. App. 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transporation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. 1202(a) provides:

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. 1203 provides, in pertinent part:

This title shall not apply to—

* * * *

(2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly

been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

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